FILED
AUG 30 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 385

THE CITY OF ST. LOUIS, a Municipal Corporation, ANNE M. EVANS, HENRY ERNST and SARAH ERNST,

Petitioners,

AGAINST

CHARLOTTE CLARK LINDSAY,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Missouri and Brief in Support Thereof.

E. H. WAYMAN,
City Counselor,

FRANCIS SULLIVAN,
Associate City Counselor,

Attorneys for Petitioner,
City of St. Louis.

A. M. EVANS,
Attorney for Petitioners
Evans and Ernsts.

JEFFREY PRESS, INC.

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IN THE

Supreme Court of the United States

NO. , OCTOBER TERM, 1940

THE CITY OF ST. LOUIS, a Municipal Corporation, ANNE M. EVANS, HENRY ERNST and SARAH ERNST,

Petitioners,

against

CHARLOTTE CLARK LINDSAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully ask that leave be granted to file this petition, and respectfully show:

Statement of Matter Involved.

On Sept. 21, 1925, a judgment in rem was duly rendered to enforce the collection of a city benefit assessment. On August 2, 1935, the City of St. Louis applied for execution. It was duly issued. On Sept. 14, 1935, the property was sold by the sheriff to petitioner Evans. The sheriff's deed was delivered to her Sept. 30, 1935. The price paid covered taxes, interest and costs. On March 7, 1936, the property was conveyed by warranty deed to petitioners Henry and Sarah Ernst, who placed two deeds of trust on it.

A petition filed in equity Feb. 16, 1937, was sustained. The Circuit Court ruled, "Said property was sold *without due process of law* * * *" "that neither plaintiff nor her husband had any actual notice * * *", and "was not notified of the pendency of said suit except by advertisement as one of a class of property owners in said district * * *"; that the purchaser "paid an unconscionable low price at said sale * * *"; that "said sale is void" and the sheriff's deed "hereby is canceled" and the deeds of trust "are canceled"; that defendant "Evans" is indebted "to plaintiff for the rental value of said property * * * or a total of $500.00" less credits due her "of $85.00 * * * for sheriff's deed—$112.60 paid by her as general taxes * * *" and further, "The Court assesses the costs in this case in favor of plaintiff and against defendant Evans."

The Missouri Supreme Court issued a contradictory mandate Feb. 21, 1940, as follows (R., p. 54, l. 13):

> "that the judgment * * * be in all things affirmed and stand in full force and effect",

and remanded it

> "with directions to modify * * * upon the issue of inadequacy of price and the actions of defendants"

thus omitting the constitutional question of "due notice" sustained by the Circuit Court, and upon which the entire judgment of the Circuit Court rests. The Circuit Court declared the sheriff's sale *void* (R., p. 5) for lack of "due notice" and cancelled the sheriff's deed, hence the purchaser never had any title upon which to base the collection of rents, so a judgment for $500.00 in rents was rendered. Changing the issue to that of fraud, then the sheriff's deed would have conveyed title until *set aside* by the Court, and the rule governing the right to rents would require that the rents follow the title.

Statement Disclosing Basis of Jurisdiction of the Supreme Court of the United States.

The judgment herein sought to be reviewed is a final judgment of the highest court of the State of Missouri. The opinion filed herewith holds as "moot" (R., p. 48, l. 5) the constitutional question of "due process" under Sec. 30, Article II of the Constitution of the State of Missouri, and under Section 1 of the Fourteenth Amendment of the Constitution of the United States, raised in plaintiff's petition (R., p. 10, l. 39, and p. 12, l. 29), sustained by the Circuit Court (p. 4, l. 36), objected to in your petitioner's assignment of errors (p. 21, l. 28); referred to in the Opinion of the Missouri Supreme Court in these words, "Respondent did not have actual knowledge of the proceedings * * * or of the sale" (R., p. 49, l. 8) and the issue is "Moot" (p. 48, l. 5); objected to in the Motion to Modify (R., p. 55, l. 1) and in the Motion to Transfer to Court En Banc (R., p. 59, l. 10) and in the Motion for Rehearing (R., p. 57, l. 42); and contested herein by this application for a Writ of Certiorari.

The Opinion of the Supreme Court granted the full relief prayed for in the petition and granted by the Circuit Court on the following non-federal grounds (p. 54, l. 18):

1. "Inadequacy of price", and
2. "Actions of defendants."

As the price paid, complied with the judgment in rem (p. 40, l. 10), being sufficient to pay the tax, interest and costs and charges (p. 44, l. 30) it is doubtful if there was "inadequacy of price".

As the "actions of defendants" complained of in the Supreme Court Opinion were alleged in the plaintiff's petition (p. 11, l. 14) to have been "after defendant * * * received said sheriff's deed * * *", these "actions" could have had nothing whatsoever to do with procuring the judgment or with the conduct of the sale enforcing the

judgment. Hence these "actions" could not have been fraudulent as to plaintiff's rights.

In accordance with Sec. 6230-35 R. S. Mo. 1929, plaintiff tendered the amount paid at the sale (p. 5, l. 38). In the finding of fact as shown by the Supreme Court decision, none of the requirements pre-requisite for setting aside a tax deed were existing. There was a general tax (for three years delinquent tax) paid; but it was paid after the sale (R., p. 3, l. 9) and the Supreme Court Opinion says, "The City has its judgment, interest and Costs" (R., p. 48, l. 2).

There was therefore no adequate non-federal ground apparent for the decision. Failure on the part of the Supreme Court of Missouri to find that plaintiffs had "due notice" of the judgment and sale as required by the State and Federal Constitutions, and that therefore the sheriff's deed conveyed title to the purchaser, deprived your petitioners of their right to property and protection guaranteed by the Constitution.

Was This an Untenable Attempt of the Supreme Court of the State of Missouri to Evade the Decision of the Federal Question?

If So, Were the Notices by Publication in the Condemnation Suit and Execution Sale Due Process as Required by the State and Federal Constitutions so as to Vest Title to the Property in the Purchaser at the Execution Sale.

The CITY OF ST. LOUIS raised an objection to the statement, "Respondent did not have actual knowledge" in their Motion to Modify, on the ground of its apparent conflict with state and federal laws permitting notice by publication.

Will This Statement Lead One to Believe That the Procedure in Condemnation Under the City Charter and the State Statutes Authorizing Notice by Publication Is Not in Accord With Sec. 1, Art. 14 of the Constitution of the United States?

Miss B. Hanger was the trustee of the deeds of trust which the judgment held "void" (p. 5, l. 20). She had filed a special appearance (R., p. 45, l. 32) in the circuit court objecting to the jurisdiction on the ground of departure. Although evidence showed that she had not been heard the judgment recited "B. Hangar, though having answered, appeared not" (p. 1, l. 18). This finding was sustained by the Supreme Court in their affirmance of the lower court in ALL THINGS WITH FULL FORCE AND EFFECT.

Does the Evidence Show That the Trustee of These Deeds Answered, and the Circuit and the Supreme Court Had Jurisdiction as to Her?

The jurisdiction of the Supreme Court of the United States is sustained by section 344 (b), Title 28, United States Code (Judicial Code, Section 237, as amended). Your petitioners claim here, and by their applications to transfer to court en banc, to modify the decree, and to grant a rehearing in the Missouri Supreme Court, a right under the due process clause of the Fourteenth Amendment, Sec. 1, of the Constitution of the United States. These motions were overruled May 4, 1940. An Order granting extension of time for filing this petition to thirty days from August 1, 1940, was issued by Mr. Justice Black. It is believed that the jurisdiction of this Court is sustained by *Lawrence* v. *State Tax Com. of Miss.*, 286 U. S. 276:

> "Federal rights are denied as well by a refusal of the state court to decide the question presented as by an erroneous decision."

Reasons Relied on for the Allowance of the Writ of Certiorari.

1.

The Missouri Supreme Court has nullified the judgment and proceedings of another Court of last resort in the condemnation suit, *"The City of St. Louis* v. *Mary Rupp, et al.,"* No. 60,071, in Division V of the St. Louis Circuit Court, which issued the judgment in rem, by setting aside the sheriff's deed enforcing it, ten years after the judgment, which deed as a matter of fact was found to have paid the tax assessment, in violation of your petitioner's rights under the fourteenth amendment.

The notice enforcing the judgment in rem in cause #60071 (R., p. 44, l. 28) said:

> "sell at public auction to the highest bidder for cash * * * to satisfy said judgment, interest and charges."

The Opinion of the Circuit Court states (R., p. 4, l. 35):

> "The Court doth further * * * decree that plaintiff's said property was sold without due process of law by the Sheriff of said City * * * under special execution * * * to satisfy said Lien judgment of defendant City * * *, interest and costs, in * * * #60071, Division V * * * and that said sale was and is void * * * and that said sale and the deed of Thomas Madden, Sheriff of the City of St. Louis to Anne M. Evans * * * constitutes a cloud on plaintiff's title * * * and hereby is cancelled * * *"

This opinion of the Circuit Court was sustained by the Missouri Supreme Court, Feb. 21, 1940, in the Mandate

> "adjudge that the judgment aforesaid * * * be in all things affirmed and stand in full force and effect."

The sheriff was required to comply with the judgment (R., p. 40, l. 8), "directing him to proceed to sell * * *

said property * * * to satisfy said special judgments. * * *" He had no discretion in the matter. Your petitioner Evans bought "at public sale" for a price which complied with the judgment. This could not constitute a fraud. Nor could subsequent acts constitute a fraud. Further the evidence showed it to be the average price paid. The Missouri Supreme Court found (R., p. 52, l. 32):

> "This, the average price, does not establish any relation between the price and the worth of any given property. A material factor * * * the worth of the property * * * on the issue of inadequacy of price is lacking."

And on page 51, line 25, of the Record:

> "There is no such affinity between the amount of the tax judgment, interest and costs and the worth of the property subject thereto upon execution as to necessarily constitute the one a criterion for the other."

There was nothing in the Judgment ordering the sale of the property which took into consideration the *worth* of the property. Would the following statement correctly express the law under these circumstances? A COURT OF LAST RESORT HAS NO JURISDICTION TO NULLIFY THE JUDGMENT OF ANOTHER COURT OF EQUAL STANDING, BY SETTING ASIDE THE SHERIFF'S SALE AND DEED ENFORCING THE JUDGMENT OF THE OTHER COURT ON THE GROUND OF INADEQUACY OF CONSIDERATION. TO DO SO, IS A DENIAL OF EQUAL PROTECTION OF THE LAW.

2.

The Court has assumed an equitable jurisdiction it did not have, under the finding of facts as set out in the Opinion of the Supreme Court, to set your petitioners' deeds aside for the reasons directed in the Mandate (1)

inadequacy of price and (2) the actions of defendants Evans and Ernsts, when the Opinion found the price paid covered the tax judgment, interest and costs; and the actions of Evans and Ernsts took place *after* the filing of the tax deed.

Plaintiff's petition (p. 10, l. 36) says:

> "That plaintiff had no *actual knowledge* of said sale and the said sale was conducted without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Section 30 of Article II of the constitution of the State of Missouri, and * * *"

The Supreme Court Opinion found (p. 49, l. 8):

> "While appellants contend there was due service of process so as to subject the lot to the special assessment judgment, the record establishes that respondent did not have *actual knowledge* of the proceedings for the improvement of Clayton Ave. or of the execution sale prior to her notification by the Burian Realty Company."

The City of St. Louis filed its motion to modify the Opinion on the ground that (p. 55, l. 11)

> "Said opinion may be misconstrued as holding that regardless of the method of notice as required by Article XXI of the Charter with reference to condemnation proceedings, and the statutory notice with respect to execution sales, that parties in the benefit district in condemnation are required to have *actual* knowledge of said proceedings, in addition to the prescribed notice * * * notice amounting to due process of law, the latest case being Schwab v. City of St. Louis, 310 Mo., l. c. 136."

The Supreme Court overruled the Motion to Modify (p. 60, l. 1). It did not find that said sale nor said judg-

ment was unconstitutional, as it might have had the jurisdiction so to find had there been any facts to warrant it; but it erred in setting aside the judgment of another court of last resort in effect, by nullifying the sale regularly held enforcing it. If the notice of the judgment and sale were constitutional, title vested in Evans upon the delivery of the sheriff's deed to her, and title vested in Ernst upon the delivery of warranty deed to him.

There were no allegations in the Respondent's Petition charging any actions fraudulent as to her rights previous to Oct. 5, 1935, the date your petitioner recorded the sheriff's deed (p. 48, l. 35). Hence there could be no equitable jurisdiction to set the sheriff's deed and the warranty deed aside, because of the subsequent actions, namely the sale of the property by Evans to the Ernsts. Would the following statement express the law? TO GIVE EQUITABLE JURISDICTION TO SET ASIDE RECORDED TAX DEED, ALLEGED FRAUD MUST HAVE BEEN COMMITTED PREVIOUS TO THE DATE OF RECORDED TAX DEED, TO MEET REQUIREMENTS OF SEC. I OF THE 14TH AMENDMENT OF THE U. S. CONSTITUTION.

3.

The Missouri Supreme Court has decided an important question of local law, in a way probably in conflict with applicable local decisions, Rule 38, U. S. Supreme Court, in that it has affirmed a ruling of the Circuit Court, which is not only an abuse of discretion but contrary to the statutes of the state so made and provided, being sections 6230-31-32-33-34-35 of the R. S. Mo. 1929.

To defeat a tax deed Respondent was required to prove: (1) "Taxes, interest and costs be paid *before the sale.*" The Supreme Court found (R., p. 50, l. 42) "Miss Evans' bid of $85.00 * covered the judgment, interest and costs"

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*Page 50, line 40 of the Opinion gives $8.50 as the price paid by petitioner. This is a stenographic error. Page 10, line 24 of the Petition gives $85.00, as does page 50, line 42 of the Opinion.

and (R., p. 48, l. 36) "six days *subsequent* to said sale, Mrs. Lindsay paid delinquent taxes" (general taxes). (2) "That the real property was not subject to taxation." The Supreme Court found (R., p. 48, l. 11), "Commissioners appointed to ascertain * * * special benefits * * *, assessing a special benefit * * * against said lot; * * * final judgment was entered approving said report * * *" (3) "* * * had been redeemed from sale the date of the deed." There is no provision for redemption under the Charter of the City of St. Louis unless the City purchases. (4) "Tender of redemption money had been made." Respondent offers to pay the redemption money, calling it "doing equity". The Opinion reads (R., p. 48, l. 1), "Since the respondent must do equity * * *." The $85.00 is to be deducted from rents collected after the sale (R., p. 4, l. 38). Would the following statement express the law? TO DEFEAT A TAX DEED, OWNER MUST HAVE TECHNICALLY COMPLIED WITH THE TAX LAWS, TO SATISFY CONSTITUTIONAL REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT.

4.

It has so far sanctioned the departure of the lower Court from the accustomed usual course of judicial procedure, as to call for the exercise of the supervision of the United States Supreme Court.

It has damaged your petitioners' reputation for high standards of character and action by adjudging them guilty of fraud, upon a finding of fact which shows that your petitioner, relying upon the good faith of the Courts, was the highest bidder and purchased a sheriff's deed issued in due course, and having acquired the property undertook to sell it, as she saw fit. A CITIZEN IS NOT FRAUDULENT NOR SUBJECT TO PENAL BOND (R., p. 7, l. 12) FOR BEING HIGHEST BIDDER AT TAX SALE.

5.

The Decision Is Against Public Policy.

Appellants' motion TO TRANSFER TO COURT EN BANC sets out that the (R., p. 59, l. 22):

> "Court's opinion as delivered herein announces principles of law which, in effect, will destroy the effectiveness and validity of tax sales of real estate in the City of St. Louis * * *" "It is in conflict with Uhrig v. Hill-Behan Lumber Co., 341 Mo. 851, 110 S. W. (2nd) 412 * * *;" and "is in conflict with Schwab v. City of St. Louis, 310 Mo. 116, 274 S. W. 1058."

The hundreds of sales of property sold in good faith by the City of St. Louis at such tax sales will be doubtful. The hundreds of sales where the City has been required to bid and buy, will be doubtful. Thousands of land titles based on such consideration as paid in this case will rest in the bosoms of unknown future Chancellors. The open market on real estate so far as execution sale will be closed. Title companies will be bound to investigate other matters than the face of the record, making it impossible to obtain a valid title report; a title company could well be held responsible for giving a title which could be set aside by a Court in Equity long after the certificate of title was given. As Judge Greaves said in the *Mangold* case, 237 Mo. 459, titles should not depend on the "sliding state of judicial shock".

The mandate of the Missouri Supreme Court is contradictory on its face. The judgment of the lower Court cannot be "in all things affirmed and stand in full force and effect" and at the same time give "directions to modify". The mandate of the Supreme Court is contradictory in its application. It cannot affirm the lower Court in finding the sheriff's deed *"void"*, and at the same time direct a modification, which would indicate that the deeds were being *set aside* for fraud. Could the law be stated thus?

CONTRADICTORY COURT JUDGMENTS ARE VOID PER SE. PUBLIC POLICY REQUIRES COURT DECISIONS TO BE CLEARLY UNDERSTANDABLE; AND TITLE RECORDS DEFINITE AND CERTAIN, IN ORDER TO PROVIDE EQUAL PROTECTION OF THE LAW.

6.

The lower court found (p. 1, l. 19), "Appearances: * * * Defendant B. Hanger, trustee, though having answered, appeared not."

The evidence of Mr. Kozlicki on page 45 did not sustain this finding of the lower court which was affirmed by the Supreme Court when it sustained the lower court "in all things". The appearances in the Judgment show that A. M. Evans was appearing for Evans and Ernsts. The stenographer used *Mr.* B. Hanger in the first line, and *Miss* Hanger in the 10th line. The testimony of the clerk in the court room showed:

> "There was a motion filed by the attorney for Miss Hanger in this suit on April 7th. It was a special appearance of B. Hanger, trustee, objecting to the Court's jurisdiction. It was never overruled. There are no minutes showing the overruling of said motion and it was never docketed on the law docket and Judge Williams' records show that it was never acted upon and has never been before the Court."

Miss Hanger, Trustee, never answered, yet the Court tried the case when it was not at issue and gave this judgment (R., p. 5, l. 20):

> "The deed of trust to secure a pretended loan * * * to said defendant B. Hanger, trustee, for the benefit of said defendant J. E. Hanger, recorded * * * are *void* and constitute clouds on the title of plaintiff * * *"

The Court erred in so doing, when B. Hanger was not

duly before the Court. Would the following properly state the law? TO SET ASIDE DEEDS OF TRUST WHEN THE TRUSTEE IS NOT DULY BEFORE THE COURT, IS A VIOLATION OF DUE PROCESS OF LAW.

7.

Had the Supreme Court found that the judgment in the condemnation suit #60071 was ABSOLUTELY VOID, all subsequent deeds must fail, no matter what price was paid at the sale, or who were made parties defendant; but the Missouri Supreme Court cites respondent's brief (R., p. 48, l. 2): "The City has its judgment, interest and costs." The title therefore had vested, and Respondent would not be "doing equity" by paying the price which the tax deed brought at the execution sale, but would be complying with the statute, Secs. 6230-35, R. S. Mo. 1940. Respondent had not complied with the other parts of these sections. Would not a ruling requiring the holder of the tax deed to accept this tender, be a violation of the constitutional rights of the purchaser at the tax sale, and all privies at interest? Would the following be a proper statement of the law?

TO SET ASIDE AN EXECUTION SALE REGULARLY CONDUCTED, AND A DULY EXECUTED AND RECORDED TAX DEED WHICH PAID A VALID TAX, IS A VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE PURCHASER.

Summary.

For the foregoing reasons the following judgment is desired:

THE JUDGMENT OF THE SUPREME COURT OF MISSOURI IN THE CASE OF CHARLOTTE CLARK LINDSAY *V.* THE CITY OF ST. LOUIS, A MUNICIPAL CORPORATION, ANNE M. EVANS, ET AL., #36,280, IS VOID FOR LACK OF JURISDICTION UNDER THE LAW AND UNDER THE

FACTS ALLEGED; REVERSED WITH COSTS AND REMANDED.

And your petitioner prays the Court to interpret the following statements as applicable to the state and federal laws, in all of which the Supreme Court of Missouri was in error:

1. A court of last resort has no jurisdiction to nullify the judgment of another court of equal standing, by setting aside the sheriff's sale and deed enforcing the judgment of the other court on the ground of inadequacy of consideration. To do so is a denial of equal protection of the law.

2. To give equitable jurisdiction to set aside recorded tax deed, alleged fraud must have been committed previous to the date of the recorded tax deed, otherwise constitutional rights are infringed.

3. To defeat a tax deed which is recorded, the former owner must have technically complied with the tax laws, before the tax deed was recorded, to satisfy the constitutional requirements under Sec. 1 of the Fourteenth Amendment of the Constitution of the U. S.

4. A citizen is not fraudulent nor subject to penal bond for being the highest bidder at a tax sale.

5. Contradictory Court judgments are void per se. Public policy requires decisions to be clearly understandable; and title records based thereon, definite and certain, in order to provide equal protection of the law.

6. To set aside deeds of trust when the record shows that the trustee is not duly before the Court, is a violation of due process.

7. To set aside an execution sale regularly conducted, and the duly executed and recorded tax deed, which paid a valid tax assessment, is a violation of the constitutional rights of the purchaser under sec. 1 of the Fourteenth Amendment.

Summary of Law.

The Missouri law mainly relied upon by your petitioners as a basis for the United States Supreme Court decision:

Petitioners' rights under Article II, Sec. 30 of the Constitution of the State of Missouri, being the "due process" provision, were violated by the Supreme Court refusing to pass on the constitutional question.

Plaintiff was duly notified in accordance with Sections 5 and 8 of Article XXI of the Charter of the City of St. Louis, and Sec. 1198, R. S. Mo. 1929, so sale was binding on respondent's property. The sheriff's deed paid a valid tax.

"The publication of such notice, when duly had, amounts to due process of law." *Schwab* v. *City of St. Louis,* 310 Mo. l. c. 136.

"If the sale was valid, defendants (your petitioners) own the property * * *." *Uhrig* v. *Hill-Behan,* 341 Mo. 851.

Plaintiff was notified within five days (R., p. 48, l. 35) by recording deed. "Recorded instrument shall impart notice to all persons of the contents." Sec. 3040, R. S. Mo. 1929.

SUITS TO SETTLE TITLE must prove what—"* * * in order to defeat a tax deed, either that the taxes, interest and costs be paid *before* the sale; that the real property * * * was not subject to taxation; * * * had been redeemed from sale the date of the deed, * * * or tender of redemption money had been made" and

"If any person claiming title under a tax deed * * * shall be defeated * * * in any suit * * * for the recovery of the real property * * * conveyed by such tax deed, the successful claimant shall be

adjudged to pay such person * * * the full amount * * * paid * * * at the tax sale * * * and ten per cent * * * as penalty * * * and all costs in the case * * *" Sections 6230-35, R. S. Mo. 1929.

"The judgment is unassailable by a bill in equity except for fraud in the very procurement of the judgment itself." *Shemwell* v. *Betts,* 264 Mo. 268.

The Federal Law mainly relied upon by your petitioners as a basis for the United States Supreme Court decision:

Petitioners' rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, being the due process of law provision, violated by refusal of Supreme Court to pass on constitutional question.

Jurisdiction of U. S. Supreme Court authorized by Sec. 344 (b), Title 28, U. S. Code (Judicial Code, Sec. 237, as amended), and

Rule 38, Revised Rules of Supreme Court Effective Feb. 27, 1939.

Lawrence v. *State Tax Com. of Miss.,* 286 U. S. 276: "Federal rights are denied as well by a refusal of the State Court to decide the question presented as by an erroneous decision."

Prayer.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings therein, and that the judgment and decree of the Supreme Court of Missouri be reversed with costs and remanded by this Honorable Court and your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

E. H. WAYMAN,
City Counselor,

FRANCIS SULLIVAN,
Associate City Counselor,

Attorneys for Petitioner,
City of St. Louis.

MISS ANNE M. EVANS,
Attorney for Petitioners,
Evans and Ernsts.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.....

THE CITY OF ST. LOUIS, a Municipal Corporation, ANNE M. EVANS, HENRY ERNST and SARAH ERNST,

Petitioners,

against

CHARLOTTE CLARK LINDSAY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions and Judgments of Courts Below.

The amended judgment of the Circuit Court was filed Dec. 27, 1937 (R., p. 6). On April 1, 1938 (p. 7), ten days were granted to file an appeal bond in the penal sum of $1,200.00, cash, said bond to act as a supersideas on the personal judgment against defendant Evans. Rather than post a $12,000.00 cash bond, possession of the property was given to plaintiff's attorney. The appeal was duly allowed. On May 16, 1938, a certified transcript of the judgment was filed in the Supreme Court of Missouri. The Opinion and Mandate of the Supreme Court is dated Feb. 21, 1940. On March 2, 1940, motions were filed by the City of St. Louis, "To Modify The Judgment", and by defendants Evans and Ernsts, "To Transfer To Court En Banc" and "To Grant a Re-hearing". All three motions were overruled May 4, 1940 (R., p. 60, l. 1). An extension of thirty days from Aug. 1, 1940, was granted by Mr. Justice Black for filing this application.

Was There an Adequate Non-Federal Ground for the Decision of the Supreme Court of Missouri?

It is believed that the non-federal ground of inadequacy of consideration was not sustained by the facts as found in the Opinion of the Missouri Supreme Court, under Mo. law.

"Inadequacy of Price Paid", Is Not an Adequate Non-Federal Ground.

The Opinion found (R., p. 50, l. 42) that the price paid covered

> "the judgment, interest and costs"

and (R., p. 52, l. 32) that this was the average price paid at such sales, but ruled:

> "This the average price, does not establish any relation between the price and the worth of any given property. A material factor * * * the worth of the property * * * on the issue of inadequacy of price is lacking."

It may be pointed out here, that an execution sale of a piece of property for the satisfaction of a tax judgment which commands the sale for the "payment of the judgment lien", interest and costs, does not take into consideration the "worth" of the property, but "the Order of Court". The execution sale is the enforcement of the judgment.

The sale of property by an executor under the authority of the Probate Court must consider the "worth" of the property, in determining the consideration.

This explains wherein the Missouri Supreme Court is in error in their next finding (R., p. 51, l. 25):

> "There is no such affinity between the amount of the tax judgment, interest and costs and the worth of the property subject thereto, upon execution, as

> to necessarily constitute the one a criterion for the other."

When the property sells for a tax judgment there are generally many different equities involved. The condition of the property, the possibility of sale at the time, of usefulness, the ratio of the tax to the income, the possibility of law suit involving title, are all factors involving its worth, but probably do not enter into the price required in satisfying the tax judgment.

The sheriff's deed (R., p. 44) sets out that the sale complied with the judgment.

Court Findings as to "Worth" Conflicting.

The Court found (R., p. 3, last line) that the property rented for $25.00 a month. To the average person dealing in real estate, this means something very definite as to the "worth" of the property. "This property was worth $5,000.00" (p. 2, l. 31); "from four to five thousand dollars" (R., p. 50, l. 30) "and sold for less than two per-cent of its value." The price paid the sheriff is only a part of the price paid for the property.

Income tax experts add the price of the title to the price paid, as well as back taxes. Even though this Court reverses the Supreme Court of Missouri, it will not be known what price the purchaser paid for the property until a final accounting is made.

In appellant's Motion for Rehearing, your petitioners object in these words (R., p. 58, l. 12):

> "The opinion in its essence is an opinion that inadequacy of price alone is ground for setting aside the deed. This is true for the reason that, absent the prejudicial testimony of appellants' subsequent actions, consideration of which is hereby complained of, inadequacy of price stands alone as justification for setting aside the deed.
>
> Controlling decisions of this Court hold that in-

adequacy of price must be accompanied by other competent and relevant considerations to justify the setting aside of a deed."

There has never been another case in the history of Missouri Law, where the judgment and sale were regular, and the validity of the judgment was not before the Court, that a sheriff's deed based on an execution sale of a tax judgment was set aside for inadequacy of price, when the price paid, covered taxes, interest and costs.

In the *Miller* case, 82 S. W. (2nd) 579, 271 U. S. S. Ct. 1935 (p. 41), neither the tax judgment nor the tax deed was set aside. The Court set aside, during the return term of the execution, the tax sales, after the tax deeds had been recorded. The $5.25 surplusage in the sheriff's office has not been disposed of by the Court. The City of St. Louis was not required to return the money accepted for the tax deeds, nor has the $280.00 deposited in Court for the use of the purchaser been accepted by the purchaser for the sheriff's deeds. In the *Miller* case, the judgment and sale were regular. The sale was set aside for inadequacy of price which shocked the chancellor, though at the time, he was presiding over "A Court of Law".

In the *Marrs* v. *Wessel* case, 237 Mo. 597:

"Setting aside on motion * * * its *judgment.*"

"Subsequent Acts of Defendant" Is Not an Adequate Non-Federal Ground.

Since INADEQUACY OF PRICE alone has never been considered an adequate reason for setting aside sheriff's deeds based on tax judgments, the Circuit Court evidently sought to find some other justification. Over defendants' repeated objections testimony was taken as to what was done with the property subsequent to the sale.

If the judgment and sale were void because of lack of due notice, defendants subsequent acts could not have put

life into that which was already dead, so these subsequent acts could not have been fraudulent. The tax judgment was nearly ten years old, so could not have been "voidable". If plaintiff had received notice as required by the state and federal constitution, subsequent acts could have no bearing on plaintiff's right in the property.

The Circuit Court was affirmed in its finding:

> "The Court doth further order, adjudge and decree that plaintiff's property was sold without due process of law by the Sheriff * * *"

and yet was directed to omit this issue, in giving the relief prayed.

From the point of view of the Circuit Judge, if the sale was not "void" as adjudged, then all subsequent actions of defendants might not be indicative of fraud against plaintiff's right to the property. The sale was regular. No fraud had even been alleged therewith.

If the sale was to be *set aside* because of the subsequent acts of defendants, then the problem arises as to who was entitled to the rents, until these acts occurred. Plaintiff had released to defendant the possession, and rents had been collected following the title.

The Supreme Court of Missouri has settled this question in advance, by affirming the lower court in "all things, with full force and effect" and then contradicted itself.

It is evident that the mandate is so contradictory on its face, that the Circuit Court cannot comply with all parts of it. It is elementary, that the Circuit Court judgment cannot be in all things affirmed and stand in full force and effect, and yet be modified.

The Court Erred in Its Legal Interpretation of the Acts of the Defendant.

The Circuit Court Opinion (R., p. 3, l. 9) says that respondent paid delinquent taxes for 1932-33-34 on the property six days after the sale to the amount of $181.73. The Supreme Court Opinion states (R., p. 53, l. 25): "She permitted Mrs. * * * to collect rents" for five months or $125.00. "This was not in the usual and ordinary course of business." In as much as Mrs. Lindsay could not have collected from the City of St. Louis for these delinquent taxes paid after the sale, it might have been that the owner of the sheriff's deed was willing at the time to let the one amount apply on the other, and that the purpose was not as stated in the opinion, "To destroy respondent's right to relief by timely motion". Before reselling the property, plaintiff did not rely on her own opinion regarding the title, but purchased a title from the Mechin and Voyce Title Company, showing the property was free and clear of all liens, in her name. Because of the decision in the *Miller* case (supra) it was necessary to wait until the end of the return term of the execution, which was several months.

The acts complained of in the petition and set out in the Opinion are admittedly *after* the sale, and could not be an adequate non-federal reason for setting the sale aside.

The Supreme Court found (R., p. 53, l. 17): "Miss Evans delayed in asserting ownership for the purpose of depriving respondent of her remedy at law by motion." The Southwest Reporter said in its topical sentence, that she did not record her deed, 139 S. W. (2nd), No. 4, p. 906, until the end of the return term of the execution, but the finding of fact shows:

> "* * * said Sheriff executed a deed in open Court * * * on Sept. 30, 1935, and delivered same * * *" and "The sheriff's deed was recorded Oct. 5, 1935" (R., p. 48, l. 33).

Respondent therefore had notice within five days that her property had been sold, as far as defendant's actions were concerned in recording the deed.

The acts of defendants could not be an adequate non-federal reason for setting the sale aside, and there was timely objection in the assignments of error and in the motions to transfer to court in banc, and to grant a rehearing.

The Sale Must Have Been Set Aside Because Plaintiff Claimed She Had No Actual Knowledge, in Spite of the Legality of the Notices Given.

Having disposed of the two non-federal reasons given by the Supreme Court for setting the sale and deeds aside, we may consider the decree (R., p. 49, l. 8): "Respondent did not have actual knowledge."

The Opinion seems to infer a duty on the part of the purchaser at the execution sale to see that Respondent had actual knowledge of the sale. The Courts have long recognized that in some instances, if small amounts of taxes are to be collected for city benefits, that "Notice by Publication" is essential. When the City was unable to see that she had actual knowledge, it would be a difficult matter to require this of a purchaser. The Opinion found that defendant Evans knew that Respondent had no actual knowledge. This was a conclusion unsupported by any evidence that defendant had met Respondent before the filing of the suit which was five months after the sale. The records showed a deed of trust outstanding against the property for $2,500.00 (R., p. 48, l. 10), which might be interpreted as meaning that the title owner had no equity left in the property, and had no interest in paying the tax even if she had actual knowledge of the tax sale.

Appellants' Motion to Transfer to Court en Banc brought the federal question involving the rights of your petitioners squarely before the Missouri Supreme Court for reconsideration (R., p. 59).

> "The constitutionality of this entire special benefit proceeding has been raised by the respondent at each step of our case in this wise:"
>
> "The Court * * * has seen to treat them as MOOT."

Objection was also raised in Motion for Rehearing.

The Motion of the City of St. Louis to Modify quotes from the Opinion:

> "While appellants contend there was due process so as to subject the lot to the special assessment benefit, the record establishes that respondent did not have actual knowledge of the proceedings"

and say that said opinion should be modified

> "for the reason that * * * opinion may be misconstrued as holding that regardless of the method of notice as required by Article XXI of the Charter with regard to condemnation proceedings, and the statutory notice with respect to execution sales, that parties in the benefit district in condemnation are required to have ACTUAL KNOWLEDGE of said proceedings, in addition to the prescribed notice."
>
> "The opinion as handed down will have a very serious effect, * * * causing appellant to become the owner of thousands of parcels of property on which it will be unable to collect taxes. Moreover, if the opinion is susceptible to the construction we apprehend it would make no difference whether or not the sale price is adequate."

We submit that your petitioners are entitled to have the Court pass upon the question as to whether or not such notice as was given in the condemnation proceeding and the execution sale, constituted "due process of law" as provided under Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, and Section 30, Article II of the Constitution of the State of Missouri. PUBLIC INTEREST WILL BE PROMOTED BY A

PROMPT SETTLEMENT IN THIS COURT OF THE QUESTIONS INVOLVED.

Cases Discussed by the Supreme Court of Missouri in Supporting Their Opinion in the Case at Bar.

The general rule in Missouri is that inadequacy of price alone is not sufficient to set aside a sale. It must be coupled with some irregularity at the sale. Judge Black expressed the rule in *Wagner* v. *Phillips,* 51 Mo. 117, which has been followed for many years:

> "Where there is gross inadequacy of price, the proceeding of the sheriff on the execution ought to be free from irregularities."

In the *Lindsay* case the Court has sought these irregularities in the sale, but failing to find them, has used irrelevant matter occurring after the sale which was included over defendants' objections through an abuse of process, and which show on the face of the record that they occurred long after the judgment and sale.

The Court's Opinion on page 51, line 34, states "the rule with its modifications", and quotes *Guinan* v. *Donnell* (Banc), 201 Mo. 173, 202, as a sustaining authority, also cited in *Mangold* v. *Bacon,* 237 Mo. l. c. 522. Contradicting this, Judge Greaves speaks directly: "Conduct alone was sufficient to avoid the deed." Fraud was shown in connection with the sale itself.

The Court's Opinion, page 52, line 14, says: "Consult Hannibal & St. Joe Rd. Co. v. Brown, 43 Mo. 294, 297." This is another of the cases discussed by Judge Greaves in the *Mangold* case, 237 Mo. 542, which Judge Greaves points out was erroneously relied upon by Judge McFarlane in the *Mangold* case. It does not sustain setting aside a sale for inadequacy of consideration. The valuation of the property was $114,800 and it sold for $35.00. While the judgment was being reversed in the Supreme Court, the execution sale took place. "When the judgment was re-

versed (43 Mo. 297) all the proceedings * * * were vacated."

In the *Mangold* case, an effort had been made to comply with the tax law. The tax was paid, and it was through mistake that the costs of suit were not paid, but in the case at bar it was more than ten years after the tax judgment that plaintiff tendered into court the amount of the benefit assessment. She had lived in this house and must have known of the improvement to the street and enjoyed its benefits, and could have secured actual knowledge of the benefit had she made the effort. The judgment, page 3, line 12, shows that she was behind three years in her general taxes. The price paid for the sheriff's deed in the *Mangold* case did not cover taxes, interest and costs, while it did in the case at bar.

Judge Greaves Dissents.

Judge Greaves briefed all the cases cited in the *Mangold* case and showed that they did not uphold the opinion regarding inadequacy, but were in many cases of the opposite opinion, he dissented with these words, 237 Mo. 542:

> "THERE HAS BEEN NO OPINION OF THIS COURT THAT WILL BE FOLLOWED BY MORE DISASTROUS RESULTS * * * LAND TITLES ARE MADE DEPENDENT UPON THE SLIDING STATE OF SHOCK TO THE CHANCELLOR'S CONSCIENCE."

> "TO HOLD TAX SALES, MADE OPENLY AND FAIRLY, BAD FOR MERE INADEQUACY OF PRICE PAID, IS TO ABSOLUTELY DESTROY OUR METHOD OF COLLECTING TAXES."

Other cases cited by Judge Bohling do not sustain the contention, page 52, line 10. *State ex rel.* v. *Elliott,* 114 Mo. App. 562, 566. The $12.50 paid for property worth $4,000.00 did not pay the tax and costs. In *Mitchell* v. *Jones,* 50 Mo. 438, the Court says: "The judgment of partition must be

reversed." In *Davis* v. *McCann,* 143 Mo. 172, 177, the Court says: "The execution issued by the clerk of his own volition" where the statute provides (Sec. 4895, R. S. Mo. 1889): "The party in whose favor any judgment * * * is rendered, may have an execution * * *." In *Siela* v. *Kneib* (Mo.), 176 S. W. 1052, there was a fiduciary relation between the parties which was violated. The Court said: "The relation of these parties to each other is an all important element in the transaction." In *State ex rel.* v. *Nathan* the sale was advanced. The prosecuting attorney bought it.

The Uhrig Case.

In the recent case of *Uhrig* v. *Hill-Behan Lumber Company,* 314 Mo. 851, upon which your petitioners rely, the Court, in denying the plaintiff the relief prayed for, states as follows, starting on page 417:

> "Plaintiffs' contention is thus stated in their brief: 'Inadequacy of price, coupled with fraud or unfairness such as to shock the conscience of the Court, will justify the Court in setting aside a deed obtained by parties using such means.'
>
> "Plaintiffs' argument is that, considering the low price, 'coupled with the general manner in which the appellants conducted themselves, it is inevitable that the conscience of the Court should be shocked, and * * * it appears that the respondents had offered to do equity and that * * * appellants can in no way be injured by a decree which provides that they shall have everything which is coming to them, including attorney's fees.'
>
> "The 'general manner in which appellants conducted themselves', constituting 'unfairness or fraud', upon which plaintiffs rely, evidently is based on the matters stated in the specific findings of the Court's decree, to wit:
>
> "'That thereafter (after judgment) the defend-

ants made no demand *upon the plaintiffs for the payment of said judgment,* but sat by and permitted the plaintiffs to improve said property to the extent of more than $2,000.00, * * * that the plaintiffs were at all times (after they learned of the same) ready, willing and able to pay the defendants such sums as might be necessary to satisfy the defendants' claim * * * that the defendants, through their agent, informed the plaintiffs that the sum of $1,565.33 would make the defendants whole in connection with all moneys due, both as to their judgment and interest thereon, and as to all expenses in connection with the collection of the same, and that the plaintiffs thereupon offered to the defendants such sum of money, which was refused by the defendants * * * and that the defendants in refusing to accept the tender made by the plaintiffs * * * have acted in such a manner as, coupled with the great inadequacy of price for which the defendants bought the property, to shock the conscience of the Court.'

"The Court did not declare the sale void or set aside the deed, *and* there is no evidence in the record upon which it could have done so. All proceedings in the mechanic's lien case were regular and there is no evidence whatever that defendants, or any of them, knew prior to the sale that plaintiffs were the owners of the note, *or did, or could have done, anything to prevent plaintiffs from learning about the sale. There was no evidence of unfairness or suppression of bidding at the sale.* * * * If plaintiffs did make any improvements after the sheriff's sale, they also collected rentals, and there is no showing as to which was greater. *However, if defendants got good title by the sheriff's sale, they were under no obligation to sell the property back to plaintiffs.* FAILURE TO DEMAND FROM PLAINTIFFS, AFTER SALE, THE AMOUNT IT

> COST THEM, OR TO ACCEPT PLAINTIFF'S TENDER OF ANY AMOUNT IS, THEREFORE, WHOLLY IMMATERIAL. *Neither could be the basis for setting aside a valid conveyance under the sheriff's sale, which the Court recognized by not doing so, nor for compelling defendants to give up a valid title. In other words,* IF THE SALE WAS VALID, DEFENDANTS OWN THE PROPERTY AND CANNOT LOSE THEIR RIGHT TO KEEP IT BY MERELY REFUSING TO SELL IT BACK TO PLAINTIFFS."

Rogers v. Dent.

In *Rogers* v. *Dent,* 292 Mo. 576, it shows how far the Missouri Courts will go in sustaining notice by publication. Too far, I think in this case. The woman had paid her tax but was not given credit for it. Notice by publication was given in the tax suit and property sold. Notice by publication was given in an equity suit to quiet title and judgment rendered. The court said: "If tax had been previously paid, that was a matter of defense in the back tax suit." Defendants owned about 25,000 acres of land that surrounded her land. This case cites *Shemwell* v. *Betts,* 264 Mo. 268.

> "The judgment is unassailable by a bill in equity except for fraud in the very procurement of the judgment itself."

When the taxes had been paid twice, once by the woman and once by the sheriff's deed, and the woman had no actual knowledge of the court proceedings, it appears that the tax judgment might have been fraudulent.

Marrs v. *Wessel.*

In *Marrs* v. *Wessel,* 237 Mo. 593, the Court "set aside the tax judgment" on motion during the return term of the execution. It has been quoted both in the *Miller* case and in this case, and sustains neither one, for in these cases jurisdiction to set aside the tax judgment was at an end, and the Court set aside the sales without setting aside the judgments, when in both cases both the sales and the judgments were admitted to be regular. In the *Marrs* v. *Wessel* case, they quote an opinion of Judge Black in *Mellier* v. *Bartlett,* 89 Mo. l. c. 137:

> "Every court has the exclusive control of its process, and no other court has the right to interfere with or control it."

The application of this principle to enable the court ordering the execution to nullify the judgment of another court, which it would have no right to nullify in a direct proceeding, would seem to be error, in the face of the fact that the judgment and sale were regular.

City of St. Louis v. *Miller,* 336 Mo. 1122; *Supreme Court of U. S. #271, June, 1935.*

Although the cases cited according to Judge Greaves did not sustain the opinion in the *Mangold* case in setting aside a deed for "inadequacy of consideration", the Court went further in 1935 in the *Miller* case (supra), and set aside tax execution sales "on motion" in a law court, for "inadequacy of price" after deeds had been recorded, though the price paid covered tax interest and costs which it did not do in the *Mangold* case.

The property consisted of a row of five one-story brick stores. The property in the name of John Dean (Supreme Court, #271, p. 82) was subject to a first deed of trust for $36,000.00 and a second deed of trust for $11,000.00. The sheriff sold the property for tax Sept. 16, 1932. The larger creditor thereafter foreclosed his deed of trust Oct.

11, 1932, and thereafter filed a motion during the term of Court when the sale had been acknowledged and the deeds delivered. The price paid for the sheriff's deed covered taxes, interest and costs, was $285.00. The $5.25 surplusage in the sheriff's office has not been disposed of by the Court, nor has the $280.00 deposited in Court for the use of the purchaser, been accepted for the sheriff's deeds. The property is in possession of the largest creditor. All the smaller creditors have lost their money.

There are a number of items here to shock the moral sense of a chancellor. This Chancellor's moral sense was shocked at the price paid at the tax sale, not at the $47,000.00 deeds of trust on a row of one-story buildings. As Judge Greaves calls it, we have "a sliding state of shock", which might raise several questions:

> Is it legally correct for an Execution Court (a Court of Law) to set a sale aside which took place under Order of Court the preceding term, after permitting deeds to be delivered?
>
> Is it legally correct for the Execution Court to choose which one of several creditors might redeem after the deeds have been recorded, when the statutes permit no redemption?
>
> Is it legally correct for a judge at a subsequent term, ON MOTION to set aside sales whose recorded deeds (U. S. Sp. Ct., 271, p. 85) show that the sale took place, and therefore that the title vested the preceding term?

These acts of the Court may not be legally correct. The orders setting aside the sales may indeed be void, and the purchaser at the tax sale may be entitled to the property, but can only be corrected by the supervisory power of the Supreme Court of the United States.

The Missouri Supreme Court pointed out (R., p. 53, l. 10):

> "(Appellant Evans was an interested party in St. Louis v. Miller, supra)" and further down, "She

testified that on account of her experience in the Miller case she *purposely* waited until the end of the September Term, 1935 of Court before actually making known her ownership * * *"

From this the Judge seems to infer that ownership began with the date of the recorded deed, but according to the *Miller* case, ownership during the return term of the execution seemed to be dependent upon that sliding rule of shock discussed by Judge Greaves in the *Mangold* case.

The sales and judgments were regular, and the price paid covered tax, interest and costs. Many possible precedents suggest themselves in following the decision in the *Miller* case which would not be desirable. Much litigation in the state courts has resulted.

Ellis v. *Powell*, 117 S. W. (2nd) 225, 226 (2).

Following the *Miller* case (supra) Judge Gantt in 1938 ruled on the *Ellis* case, but said, "The consideration of $8.50 paid no taxes"; so grossly inadequate as to amount to a fraud at law.

Our state law, Sec. 6230, R. S. Mo. 1929, applies to all cities of one hundred thousand population or more, including municipal corporations which fall under cities of the first class as required by the Constitution for purposes of classification. It sets out what the claimant must prove in order to defeat a tax title. He must have technically complied with the tax laws before the deed is recorded. Applying this as a yard stick we find in the *Ellis* case, there is no showing that the owner had technically complied with the tax law. He is allowed to have his property back by order of court.

It was apparent on the record when the sale was acknowledged in open court, that the consideration was not adequate to comply with the tax judgment. Did the sheriff and the judge owe no duty to the citizens of the state, to see that the tax judgment was complied with, before

permitting the sheriff to deliver a deed? And when the deed was delivered was there not a contract entered into between an officer of the court and the purchaser, UNDER AUTHORITY OF THE COURT, which upon recording the tax deed, was accepted by the purchaser? Should a court be permitted to change its mind any time during the next few months (during the execution term) or should it be estopped from so doing because of its act in permitting the acknowledgment to be taken? Should our concept of parties to a contract be different for courts than for citizens? "All proceedings leading to the sale of the lot were regular." Here again the Court says, "Did not have actual notice." If the court had no jurisdiction to set aside the tax judgment at the time the petition was filed, what jurisdiction could be acquired over the tax deed subsequently, when all the proceedings leading to the sale were regular? Should the citizens of a state be burdened with the expense of court procedure to collect taxes, and after the tax deed paid the tax, by order of Court the man who failed to pay his tax is still allowed to keep his property? Such decisions are a violation of due process, and equal protection of the law.

Such error, as seems to be creeping into Missouri decisions should be corrected by the supervisory powers of the Supreme Court of the United States.

The Sliding Scale of Shock as it Effects Setting Aside Execution Sales to Petitioner.

Your petitioner has had experience in four cases involving tax sales in the city of St. Louis. In the *Miller* and *Lindsay* cases, where the property was of value, the sales were set aside, in the case of *The City of St. Louis* v. *Gottschall,* 121 S. W. (2nd) 239, where the property was of no value being a vacant lot in a field of weeds for which $135.00 was paid, and upon which the City was demanding some $700.00 back assessments under threat of foreclosure, though the purchaser asked that it be set aside, she was required to keep it. Later she tested the validity of one of these back assessments in *City of St. Louis* v. *Wall,* 124 S. W. (2nd) 616, and was upheld by the St. Louis Court of Appeals. The City sold the property for a benefit assessment and then resold it for an assessment due previously, so that no title would have remained in petitioner. This the Court of Appeals did not permit, and the second sale was set aside on motion. But the expense of litigation therewith was great.

It is believed that your petitioner has shown both from the evidence as found in the Opinion, and the law of the State of Missouri that THERE WERE NO NON-FEDERAL GROUNDS FOR SETTING ASIDE THE SHERIFF'S DEED OF YOUR PETITIONER.

There Were No Adequate Federal Grounds.

In order that the law and the facts relating to the constitutionality of the notices given in the condemnation suit and the execution sale enforcing it may be fully before this Court, the brief and argument of The City of St. Louis were certified to this Court and are attached hereto as Appendix 1. The entire evidence of the City of St. Louis has been certified to this Court and is found in the transcript of the record, pages 22 to 45.

Conclusion.

We respectfully submit that this case is one calling for the exercise by this court of its supervisory powers in order that the errors of the Supreme Court of Missouri herein pointed out may be cured and that your petitioners' fundamental constitutional right, safeguarded by the Fourteenth Amendment, to a right to a decision on the constitutional question raised, and to equal protection of the law, may be protected and enforced.

Respectfully submitted,

E. H. WAYMAN,
City Counselor,

FRANCIS SULLIVAN,
Associate City Counselor,

Attorneys for Petitioner,
City of St. Louis.

A. M. EVANS,
Attorney for Petitioners,
Evans and Ernsts.

Appendix 1.

PETITIONER CITY OF ST. LOUIS, STATEMENT, BRIEF AND ARGUMENT IN THE SUPREME COURT OF MISSOURI.

Statement.

The case at bar is a suit in equity for the cancellation of a warranty deed from appellant Anne M. Evans delivered to appellants Henry Ernst and Sarah Ernst, his wife, and a first and second deed of trust from appellants Henry Ernst and Sarah Ernst, his wife, to the trustee for J. E. Hanger and to set aside an execution sale and the deed thereunder from the Sheriff of the City of St. Louis to appellant Anne M. Evans.

This suit is the result of a sale made by the Sheriff of the City of St. Louis to appellant Anne M. Evans under date of September 14, 1935, for the sum of $85.00, which sale was made pursuant to the special execution requested by the appellant The City of St. Louis under a special benefit judgment rendered against the property involved herein on September 21, 1925, under the proceeding instituted by the City of St. Louis entitled "The City of St. Louis v. Mary Rupp et al.," for the change of grade of Clayton avenue from Kraft avenue to the city limits, as provided under ordinance 27361 of the City of St. Louis.

Under said change of grade proceeding the Circuit Court appointed commissioners as provided in Section 5 of Article XXI of the Charter to view the property to be damaged or assessed; fix a benefit or taxing district and publish a notice of said benefit or taxing district in a newspaper for ten days before beginning their assessment, and a notice of the boundaries of said benefit or taxing district, and of the time and place at which they would assess such damages and benefits, and where said commissioners would hear evidence submitted by the parties interested. Said

notice was published in the St. Louis Daily Record for a period of ten days from January 22, 1925, to and including February 2, 1925 (Appellant's Abstract, page 78).

The commissioners appointed in said cause filed their report on May 5, 1925, in which report said commissioners assessed the property involved herein in the sum of $7.50.

On September 21, 1925, the Court approved the report of said commissioners and rendered final judgment in said cause, wherein the property involved in this suit was assessed the sum of $7.50.

On July 31, 1935, appellant The City of St. Louis filed a motion in the Circuit Court for special execution and said Court ordered such execution issued and the same was issued returnable to the September Term, 1935, of said court. On September 14, 1935, the Sheriff sold said property to appellant Anne M. Evans for the sum of $85.00, as herein stated.

On March 7, 1936, appellant Anne M. Evans conveyed the said property to appellants Henry Ernst and Sarah Ernst, his wife, and on same date the appellants Henry Ernst and Sarah Ernst, his wife, executed and delivered to appellant Anne M. Evans a deed of trust on said property for $3,000.00 and a second deed of trust on said property for $600.00.

On December 20, 1937, the Circuit Court rendered a decree in favor of plaintiff and against all defendants in said cause, rendering said sale by the Sheriff to appellant Anne M. Evans void and of no effect and canceling and holding for naught said Sheriff's deed. The Court also adjudged and decreed the deed from appellant Anne M. Evans to appellants Henry Ernst and Sarah Ernst, his wife, void and canceled nad held the same for naught. The Court also adjudged and decreed that said deeds of trust were void and canceled and held the same for naught.

The said defendants have appealed from the judgment and decree of the Circuit Court.

Assignments of Error.

I.

The Court erred in finding in favor of plaintiff and against all defendants.

II.

The Court erred in finding that neither the plaintiff nor her husband had actual notice in the cause entitled, "City of St. Louis v. Mary Rupp et al., No. 60,071," for the change of grade of Clayton and Kraft avenues in the City of St. Louis and that there was no evidence on which the Court could find that plaintiff's privies in title had any actual knowledge of the pendency of said suit for said change of grade for the reason that said plaintiff, or her predecessors in title, were duly notified by the commissioners appointed in said change of grade suit pursuant to Section 5 of Article XXI of the Charter of the City of St. Louis.

III.

The Court erred in finding that the plaintiff notified the Revenue Collector of the City of St. Louis of how she could be notified of taxes due on said property, in that said Collector of Revenue is a state officer and is charged with the duty of collecting general taxes and that said Collector has no connection with, or knowledge of, special benefits assessed against various real property in said City, and that such notification to said Collector is not binding on this appellant.

IV.

The Court erred in finding that it was the practice of the City of St. Louis to notify the property owners of its intention to sell the property to satisfy special assessment levies thereon, in that said notification, if any, was a mere courtesy on the part of the defendant City of St. Louis and that it is under no obligation to notify property owners whose property is assessed a benefit.

V.

The Court erred in finding that defendant City of St. Louis had good reason to believe that plaintiff did not know that said benefit judgment had been rendered against her property and that the City of St. Louis had caused special execution to be issued against her property to satisfy same, for the reason that said plaintiff was duly notified in accordance with Sections 5 and 8 of Article XXI of the Charter and Section 1198 of the Revised Statutes of 1929, respectively.

VI.

The Court erred in finding that defendant, Anne M. Evans, knew that plaintiff did not know her property had been sold and for the purpose of depriving plaintiff of her right to move the execution division of said Court to set aside said sale did not claim said property under said Sheriff's deed until the time within which plaintiff could file a motion to set aside the sale had passed, in that said plaintiff was duly notified that her said property would be sold by the Sheriff pursuant to notice published in accordance with Section 1198, Revised Statutes of 1929.

VII.

The Court erred in finding that defendant Anne M. Evans paid an unconscionably low price for said property at said Sheriff's sale.

VIII.

The Court erred in finding, adjudging and decreeing that plaintiff is entitled to the relief prayed and that plaintiff is the owner of the fee-simple title to the property involved herein, for the reason that plaintiff, or her predecessor in title, was duly notified of the proceedings in the suit for the change of grade pursuant to Section 5 of Article XXI of the Charter of the City of St. Louis and that said property was sold by the Sheriff of the City of St. Louis under a benefit judgment rendered in said change of grade

proceeding when said Sheriff's sale was conducted in accordance with the laws of the State of Missouri and particularly Section 1198, R. S. 1929.

IX.

The Court erred in finding, adjudging and decreeing that said property was sold without due process of law by the Sheriff in the City of St. Louis on the 14th day of September, 1935, under special execution issued at the office of the Clerk of the St. Louis Circuit Court.

X.

The Court erred in finding, adjudging and decreeing that said sale by the Sheriff was and is void and of no effect and that said sale constitutes a cloud on plaintiff's title to said property.

XI.

The Court erred in finding, adjudging and decreeing that said deed of the Sheriff to defendant Anne M. Evans is canceled and for naught held.

Points and Authorities.

I.

Respondent or her predecessors in title had due notice of the proceeding for the change of grade in which respondent's property was assessed a benefit by the commissioners appointed in said change of grade suit, which assessment resulted in a benefit judgment against respondent's property.

Section 5, Article XXI, St. Louis Charter;
St. Louis v. *Ranken,* 96 Mo. 497, 505;
Buddecke v. *Ziegenheim,* 122 Mo. 239, 243;
Eyssell v. *St. Louis,* 168 Mo., l. c. 616;
St. Louis v. *Calhoun,* 222 Mo. 44;
Schwab v. *City of St. Louis,* 310 Mo. 116;
Section 8, Article XXI, St. Louis Charter.

II.

Respondent's notice to the Collector of Revenue of the City of St. Louis where said respondent could be notified of taxes due on her property was not notice to appellant City of St. Louis with respect to special benefit assessments, as said Collector of Revenue is a state officer and said notice to said Collector was not binding on this appellant.

Section 9883, R. S. 1929 et seq.;
Section 10004, R. S. 1929.

III.

Appellant City of St. Louis is not under any legal obligation to notify property owners that their property is assessed a special benefit under Article XXI, of the Charter of the City of St. Louis.

IV.

Respondent was duly notified that said property was to be sold by the Sheriff pursuant to the notice of said sale in accordance with the statutes.

Section 1198, R. S. 1929.

V.

Respondent had the opportunity to move the Court, granting the motion of appellant for execution, to set aside the sale made thereunder during the return term.

City of St. Louis v. *Miller,* 82 S. W. (2d) 579;
City of St. Louis v. *Del Place Realty Co.,* 259 Mo., l. c. 140.

VI.

Inadequacy of price is not sufficient grounds to set the sale aside, especially since said sale was properly and fairly conducted.

Wagner v. *Phillips,* 51 Mo. 117;

Million v. *McRee,* 9 Mo. App. 344;
Walters v. *Hermann,* 99 Mo. 529, 12 S. W. 890;
Briant v. *Jackson,* 99 Mo. 585, 13 S. W. 91;
Knoop v. *Kelsey,* 121 Mo. 642, 26 S. W. 683.

VII.

The notice published by the commissioners pursuant to Section 5 of Article XXI and the sale under the special execution pursuant to Section 1198, R. S. 1929, constituted due process of law.

Lohman v. *Stocke,* 94 Mo. 672;
Harness v. *Cravens,* 126 Mo. 233;
Harper v. *Hopper,* 42 Mo. 124;
Young v. *Schofield,* 132 Mo. 650, 34 S. W. 497;
Buchanan v. *Atchison,* 39 Mo. 503.

Argument.

I.

Appellant City of St. Louis contends that the proceedings for the change of grade of Clayton avenue from Kraft avenue to the city limits were in due form and in accordance with the charter.

The petition for said change of grade proceeding was filed on November 8, 1922, which petition named as defendants therein all parties whose property was to be *damaged* as a result of said change of grade.

On October 14, 1924, the City filed its affidavit for an order of publication, and said order of publication was granted on said day for those "not found" and "nonresident" defendants whose property was proposed to be *damaged* by said change of grade.

On December 15, 1924, the Court appointed commissioners pursuant to Section 5 of Article XXI of the Charter to view the property to be damaged or assessed; fix a benefit or taxing district and publish a notice of

said benefit district in a newspaper for ten days before beginning their assessment; a notice of the boundaries of said benefit or taxing district; the time and place at which they would assess such damages and benefits and where they would hear evidence submitted by the parties interested. Said notice was published in the St. Louis Daily Record for a period of ten days from January 22, 1925, to and including February 2, 1925 (App. Abs., p. 78).

On May 5, 1925, the commissioners appointed in said cause filed their report, in which report said commissioners assessed against the property involved in this suit the sum of $7.50.

On September 21, 1925, the Court approved the report of said commissioners and entered final judgment in said cause wherein the said property involved was assessed a benefit judgment in the sum of $7.50.

The respondent or her predecessors in title were given due notice of the change of grade proceeding in accordance with Section 5 of Article XXI of the St. Louis Charter as disclosed in the record herein (App. Abs., p. 79).

Said section 5 of article XXI is as follows:

> "Section 5. The commissioners shall view the property to be taken, damaged or assessed; fix the benefit or taxing district; *publish in said newspaper for ten days before beginning their assessment a time and place at which they will assess such damages and benefits;* hear the evidence submitted by the parties interested; assess the damages and benefits as of the date said ordinance became effective and make report, in which at least *two commissioners shall concur* of such assessment in writing and under oath to the circuit court. In such report the compensation allowed to and the benefits assessed against each owner shall be separately stated. When the commissioners both assess benefits and allow damages against any one property owner they shall deduct the lesser from the greater."

Respondent or her predecessor in title owned property within the confines of the benefit district as set out in the published notice (App. Abs., p. 79).

It has been held in numerous decisions of this Court that property owners in the benefit district need not be made a party to the original summons in view of the fact that he has his notice and hearing at a later stage of the proceedings.

This Court has expressed itself with respect to notice in a condemnation proceeding in the case of *St. Louis* v. *Ranken,* 96 Mo. 497, l. c. 505, as follows:

> "The determination of the question, what property of the citizens will be benefited by a public improvement, is the exercise of legislative power, whether exercised by the Legislature directly or by municipal authorities to whom the power is delegated for that purpose, and *'due process of law is not essential to its legitimate exercise.'* These authorities may determine directly the district in which property will be benefited and the amount of the benefit, and erect a uniform standard for its apportionment therein. When a tax is to be assessed in proportion to benefits, the apportionment is a quasi-judicial proceeding in which, at some stage, the owner has the right to be heard upon the question of the amount to be assessed against his property before a charge therefor finally attaches thereto for its payment, and to notice not necessarily judicial in its character, but such as is appropriate to the nature and character of the proceeding, of his right to be so heard, *nor need such notice be personal.* The legislative authority may prescribe what the manner of the notice shall be; and when the statute provides for such notice and hearing, its terms must be complied with in order to a valid assessment, *and when the assessment is made in conformity with such requirements it is final, conclusive and binding.* Egyp-

tian Levee Co. v. Hardin, 27 Mo. 495; Newby v. Platte County, 25 Mo. 258; Garrett v. City of St. Louis, 25 Mo. 505; Cooley Const. Lim. 497, 505; Cooley on Tax. (2 Ed.) 637, sec. 5 et seq., and 653, sec. 6 et seq. and notes; In re De Peyster, 80 N. Y. 565; In re Zborowski, 68 N. Y. 88; People v. Smith, 21 N. Y. 595; Pearson v. Zable, 78 Ky. 170; Holt v. City Council of Somerville, 127 Mass. 408; Reclamation District v. Evans, 61 Cal. 104; McMillan v. Anderson, 95 U. S. 37; Davidson v. New Orleans, 96 U. S. 97; Hagar v. Reclamation District, 111 U. S. 701; Kentucky Railroad Tax Cases, 115 U. S. 321; Spencer v. Merchant, 125 U. S. 345; Lent v. Tillson, 72 Cal. 404; s. c. 19 A. & E. Corp. Cases 640.

"It will be observed that the Charter and ordinances governing in this case make provision for the erection of a taxing district, the assessment of especial benefits upon the property within that district in the proportion that the property of each owner is especially benefited by the public improvement, and for the apportionment of such special benefit among the several owners of such property, by the assessment against each separate piece of land of such owners of a tax equal to its proportionate share of such especial benefit, *and provides for appropriate notice to such owners of the creation of such district by the commissioners charged with that duty, of its metes and bounds, of the time when, and the place where, the commissioners, also charged with that duty, will proceed to make the assessment against the property in such district, and advising them of their right to be heard by the commissioners and by the Circuit Court upon the question of the amount of such assessment, and secures to them the right to be heard upon that question by the commissioners before the assessment is made, and by the Circuit*

Court upon exceptions thereto before it is made final and attaches as a lien upon the property assessed. By this legislation the right of the citizen to be heard before a charge is fixed upon his property is amply and carefully guarded. *It is not necessary that he should be made a party defendant by petition and summons in the condemnation proceedings. It is sufficient if he is made a party defendant to the tax-assessing branch of the proceeding, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the Charter and ordinances,* and an assessment made in strict conformity to their requirement is a valid assessment.

"And when the Circuit Court has taken final action upon the report of the commissioners, and the assembly has appropriated the money to pay the damages for the property taken, such assessment becomes final and conclusive upon the question of benefit to such taxpayers, and the amount of that benefit, the lien attaches to the property, *and these questions cannot be again raised in any subsequent suit that the city may find it necessary to bring to enforce that lien in order to collect the tax assessed.*"

The question of notice was further discussed in *Buddecke* v. *Ziegenheim,* 122 Mo. 239, l. c. 243, wherein this Court said:

"This case, in all of its salient features, is like that of Michael v. City of St. Louis, 112 Mo. 610, in which it is held that the question whether the city had, before the condemnation proceeding, acquired the property sought to be condemned could only be tried in such proceeding; and is not open for consideration in a suit to enforce the tax bills or to enjoin their collection; and that such ques-

tions are determinable only on exceptions being filed to the report of the commissioners appointed in the condemnation proceedings.

"While the record shows that plaintiffs were not made parties defendant to the condemnation proceedings against the property, *it does shows that they were duly notified as required by the City Charter* by five days notice in the paper doing the city printing of the establishment of the benefit district and the boundaries thereof in which property was to be benefited by reason of the opening of said street, and the time and place when and where the commissioners would proceed to assess said benefits, and that all persons interested were invited to be present. *It was not, therefore, necessary that they should have been made parties in the condemnation proceedings* to open the street (City of St. Louis v. Ranken, 96 Mo. 497), *or that they should have any other or further notice.* Moreover, every presumption is to be indulged in favor of the jurisdiction of a court of general jurisdiction, such as the Court before which the condemnation proceedings were had, *and the burden of proof rests upon him who asserts that it had not, to so make it appear.*"

In the opinion in *Eyssell* v. *City of St. Louis,* 168 Mo. 607, l. c. 616, this Court held as follows:

"And the fact that the owner of property charged with special benefits receives notice *only by publication does not militate against the validity of the assessment or the character of the order assessing benefits.*"

Further showing that the question of notice complained of by respondent has long since been fully disposed of, one

might peruse the opinion in *City of St. Louis* v. *Calhoun*, 222 Mo. 44, l. c. 53, which reads thus:

> *"Another contention is that certain property owners whose lands were not to be taken, but against whom benefits were to be assessed, were not brought into the Circuit Court by summons and for this reason the proceeding is void.*
>
> "This question was *fully determined* some years ago in the case of the City of St. Louis v. Ranken, 96 Mo., l. c. 507. In that case a party against whom benefits were assessed urged that he should have been made a party to the condemnation suit by summons from the Circuit Court, and that a mere notice from the City Counselor for him to appear at the time and place fixed for the assessment of benefits was insufficient. In that case we then said: *'It is not necessary that he should be made a party defendant by petition and summons in the condemnation proceedings.* It is *sufficient* if he is made a party defendant to the tax-assessing branch of the proceeding, by the appropriate and characteristic notice usually given to the taxpayer, provided for in the Charter and ordinances, and an assessment made in strict conformity to their requirements is a valid assessment."
>
> "And in the late case of St. Louis v. Brinckwirth, 204 Mo., l. c. 303, we disposed of the *same question* in this language: 'In the case at bar defendants claim that the proceeding is void for two reasons: First, they say that they were not parties to the condemnation suit, and for that reason the entire proceeding is void. *This contention is not good.* None of their property was to be taken or was in fact taken. Their property simply abutted on one of the alleys to be established. Had the alleys required the appropriation of any part of their land then

> they should have been made parties to the condemnation branch of the proceeding. *Otherwise they did not have to have notice of this suit'* (City of St. Louis v. Ranken, 96 Mo. 497).
>
> "It therefore follows that *this contention* must likewise be ruled against the defendants."

A later decision by this Court with respect to notice of the benefit or taxing district to be published by the commissioners will be found in *Schwab* v. *City of St. Louis,* 310 Mo., l. c. 136, which is as follows:

> "Adverting to *Section 5 of Article XXI of the existing Charter of St. Louis,* we find that it is mandatory and obligatory upon the commissioners to 'publish in said newspaper (publishing at the time the notices of said Circuit Court) for ten days before beginning their assessment a notice of the boundaries of the benefit or taxing district and of the time and place at which they will assess such damages and benefits.' *The publication of such notice, when duly had, amounts to due process of law* and confers upon the Circuit Court jurisdiction to approve the commissioners' report assessing benefits against the property not taken or damaged" (St. Louis v. Ranken, 96 Mo., l. c. 507; St. Louis v. Calhoun, 222 Mo., l. c. 53).

Undoubtedly the decisions in the above-mentioned cases set at rest the question of notice.

The Court approved the commissioners' report and rendered final judgment thereon in accordance with Section 8 of Article XXI of the Charter. Said section is as follows:

> "The Court, upon approving the commissioners' report shall render final judgment thereon reciting the report and adjudging that the city have and hold the property petitioned for, describing the same, for

> the purposes specified, upon payment of the damages less the benefits assessed in each instance; *that so much of the report as is a judgment for benefits against specific property be a lien on such property for ten years* from entry of the judgment, and prior to all other liens thereon; and that the City recover the respective benefits in excess of damages assessed in each instance against private property with interest from date of judgment *and have execution therefor.*"

This Court has held that judgment rendered in accordance with said section 8 and pursuant to the notice published by the commissioners *is not subject to a collateral attack.* Said decision will be found in *Schwab* v. *City of St. Louis,* supra, which cites the case of *St. Louis* v. *Del Place Realty Company,* 259 Mo., l. c. 140, wherein the Court said as follows:

> "Thus finding that the publication of the five days notice prescribed by Section 1069, Ordinances of St. Louis, would give the commissioners jurisdiction to assess benefits and confer upon the Circuit Court jurisdiction to approve their report and render judgment thereon, *it follows that such judgment when entered is final and not subject to collateral attack. The aforesaid Charter specifically provides that the Circuit Court, upon the filing of the report of the commissioners, and the hearing of exceptions thereto, if any be filed, may render final judgment for such benefits. The specific power granted by the Charter to the Circuit Court to enter final judgments for benefits implies the power to make such benefits effective by the issue of execution thereon, there being no constitutional inhibition against the issue of such execution,* so that the contention of appellants that no final judgment can be rendered in this class of cases, and that no execution can be issued therein, is entirely untenable."

Appellant contends that the respondent herein or her predecessors in title were duly notified of said proceeding for the change of grade by virtue of the publication of notice by the commissioners as provided by Section 5 of Article XXI of the Charter and that *such notice was due process of law;* that said respondent is bound by said notice as disclosed by the decisions of this Court hereinabove quoted.

II.

The judgment and decree of the Circuit Court finds that shortly after the respondent herein acquired the property involved she became a resident of Kansas City, Missouri, and notified the Collector of the City of St. Louis of how she could be notified of taxes due on said property.

This appellant does not dispute or deny that respondent so notified the said Collector, but this appellant contends that such notice is not binding on the City of St. Louis.

The Collector of the Revenue is a state officer and as such is charged with the duty of collecting general taxes, *but not special benefit judgments.* The Comptroller of said City is the duly authorized and *only* official charged with the collection of benefit judgments.

The office of the Collector is governed by state statute, as will be determined by referring to Section 9883, R. S. 1929, which is as follows:

> "The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

It is also provided by statute that the City of St. Louis is in the same category as a county with respect to collectors (Sec. 9885, R. S. 1929).

It is conclusive that the Collector's actions or his failure to act with respect to special benefit judgments is *not* binding on the City of St. Louis, because in Section 10004, R. S. 1929, the duties of the Collector are therein outlined. Said section is as follows:

> "The collector of the City of St. Louis shall collect the *state taxes* in the limits of said city in the same manner and to the same extent, and do and perform all other things and matters appertaining thereto, as fully to all intents and purposes as now required, or which may be required, of the county collectors."

Article XXI covers fully the provisions for condemnation and the procedure in such cases, as held in *Tremayne* v. *City of St. Louis,* 6 S. W. (2d), l. c. 943, but there is not one word in said Article XXI that places the duty of collecting benefit judgments on the Collector of Revenue; any notification respondent might have given the Collector was of no concern of the City.

III.

The judgment and decree finds that it was the practice of the City to notify property owners of its intention to sell property to satisfy special benefit judgments, but nowhere in Article XXI will there be found any provision whereby property owners are to be notified of benefit judgments or of the City's intention to sell property to satisfy said benefit judgments, and any notification on the part of the City is a mere courtesy.

The testimony of G. J. Steiner, assistant division head in the Comptroller's office, will show that the City made every attempt to locate the respondent. On several occasions the letters sent to Mrs. Lindsay were not returned, but in one instance a letter sent on April 23, 1935, to W. A.

Thompson, as agent for respondent, was returned to the Comptroller's office the latter part of June, 1935. Mr. Steiner also testified that he could not locate Mrs. Lindsay and only succeeded in locating her agent after a period of ten years. Although it is not the obligation of the City to notify said property owners, it is definitely shown that the Comptroller's office made every effort to notify the respondent.

The judgment and decree of the Court is erroneous in finding that it was the practice of the City of St. Louis to notify property owners of its intention to sell their property to satisfy special benefit judgments, because if the testimony of witness Steiner is scanned from beginning to end it will not be found that such is the practice; furthermore, there is no showing that the respondent herein relied on the custom of the City to notify property owners when an execution is issued or that respondent had knowledge of such custom, because the evidence in this case is plain that respondent pleads ignorance of a judgment on her property.

IV.

Section 8 of Article XXI of the Charter provides that the proceedings under special execution "shall conform, as near as may be, to the proceedings under special executions on ordinary judgments foreclosing liens on lands."

With the above provision in view, the City, after waiting almost ten years for payment, moved the Court for an execution, which was granted on July 31, 1935, thereupon said execution was issued returnable to the September Term, 1935. By virtue of said execution the Sheriff levied on said property on August 20, 1935, and did on August 22, 1935, begin the publication of notice, as provided for by Section 1198, R. S. 1929, and continued said publication to and including September 14, 1935. Thereupon, pursuant to said notice, the Sheriff sold said property to respondent Anne M. Evans on September 14, 1935, for the sum of $85.00.

Said Section 1198 is as follows:

> "When real estate shall be taken in execution by an officer, it shall be his duty to expose the same to sale at the courthouse door, on some day during the term of the circuit court *of the county where the same is situated,* having previously given twenty days' notice of the time and place of sale, and what real estate is to be sold and where situated, by advertisement in some newspaper printed in the county which may be designated by the plaintiff or his attorney of record, if there be one regularly published, weekly or daily, and if not, by at least six printed or written handbills, signed by such sheriff, and put up in public places in different parts of the county; and the printer's fee for such advertisement shall be taxed and paid as other costs: Provided, that in all cities in this state now or hereafter containing one hundred thousand inhabitants or more, such sales shall be on the floor of the real estate exchange or at the courthouse door, as may be announced in said advertisement."

V.

The respondent herein having had due notice of the Sheriff's sale as provided by said Section 1198, it was incumbent on said respondent to move the Court granting the execution to set aside the said Sheriff's sale during the September Term, 1935.

This Court in the case of *City of St. Louis* v. *Miller,* 82 S. W. (2d) 579, reaffirmed its holding that the trial court had jurisdiction to set aside the Sheriff's sale under an execution during the whole of the return term.

In the case at bar the respondent collaterally attacks the judgment in the condemnation suit over ten years after judgment is rendered whereas she could have moved the trial court to set aside the Sheriff's sale, *City of St. Louis* v. *Del Place Realty Co.,* 259 Mo., l. c. 140. The respondent

or her predecessors in title were in the benefit district published by the commissioners pursuant to Section 5, of Article XXI. When the report of the commissioners was filed the respondent or her predecessors in title filed *no exceptions to the report,* as provided by Section 7, of Article XXI, then on September 21, 1925, judgment was rendered in favor of the City and against the property of *all* defendants who were assessed a benefit (including that of respondent). The respondent herein did nothing to protect her interest in the proceeding but proposed to wait for a period of over ten years before she attempted to take any action, then after the property was sold at the Sheriff's sale respondent collaterally attacked the judgment in the change of grade proceeding and at the same time succeeded in getting the trial court to set aside the sale made as a result of the execution issued under the change of grade judgment rendered September 21, 1925.

VI.

The trial court in its judgment and decree found that the appellant Anne M. Evans paid an unconscionably low price for said property.

The evidence shows that the sale referred to herein was conducted in the usual manner and that there were two bids, one made by the City and the other by Anne M. Evans. If there were no other bidders, the City would have purchased the property at the sale, but it would be useless for the City to bid any more than the benefit judgment and costs because, if the City purchases property at such a sale, the former property owner is entitled to redeem in accordance with Sections 1026 and 1027 of the Revised Code of the City of St. Louis 1926. The evidence shows that appellant Anne M. Evans was the only bidder other than the City, and it was not necessary for said appellant City of St. Louis to bid any higher than the bid made by appellant Anne M. Evans.

This Court has held that mere inadequacy of price is *not*

sufficient ground to set a sale aside, but that it must be coupled with other facts, as stated in *Wagner* v. *Phillips,* 51 Mo. 117. In that particular case bidders were kept away and competition was repressed, but there are no such circumstances in the case at bar.

In *Million* v. *McRee,* 9 Mo. App. 344, the St. Louis Court of Appeals held that inadequacy of price is not a ground for setting aside a sale unless so gross as to warrant a presumption of fraud. The Court upheld a sale for $5,000 on property which was valued at from $15,000 to $18,000.

The case of *Walters* v. *Herman,* 99 Mo. 529, 12 S. W. 91, was one where the property involved was sold by the Sheriff to the respondent for $210. The respondent transferred the bid and had the bid made to respondent Short. Short sold to respondent Robertson for $2,500. Robertson then sold to respondent Terminal Railroad Company for $4,000, which consideration, except that of the Sheriff to Short, was alleged to be wholly false. This Court, however, upheld the sale and stated in its opinion as follows:

> "The only thing left, therefore, for consideration is as to the sale and the rights of the subsequent purchasers. *Mere inadequacy of price is insufficient to set aside a judicial sale.* There must be some fraud in the transaction as a general rule, where the sale is open and no improper practices are shown on the part of the purchaser unless the inadequacy is so gross as per se to amount to prove fraud in one of its numerous manifestations on the part of the purchaser. Phillips v. Stewart, 59 Mo. 491, and cases cited; 2 Pom. Eq., Secs. 926, 927; Davis v. Dreisback, 81 Ill. 393."
>
> "But granting that there was inadequacy of price at the tax sale, and gross inadequacy at that, there is nothing in the allegations of the petition which connects the subsequent purchasers with that inadequacy of price, or with notice thereof. The state-

> ment made that the various considerations mentioned in the other deeds, also sought to be set aside, were 'wholly false' certainly has no such tendency. Such an allegation is a long shot away from charging that the subsequent purchasers were mere volunteers, paying no consideration, whatever, for their purchases. Very often a larger consideration than that actually given is frequently inserted in instruments of conveyance, with the view to obtain a larger price from some future purchaser; but there is no fraud in that as against the former owner."

In the case at bar no doubt the low bid was occasioned for the reason that there were few bidders at the sale, and, as a consequence, it was not necessary for appellant Anne M. Evans to make a higher bid than the one for which she purchased the property. However, this Court, in *Briant* v. *Jackson,* 99 Mo. 585, 13 S. W. 91, stated as follows:

> "The evidence varies somewhat as to the value of the land but a fair average would make the value perhaps about $8,000.00. The amount bid, to wit, $900.00, is obviously a very low and inadequate sum, *but mere inadequacy is not enough,* though a circumstance of great weight. Robinson v. Robards, 15 Mo. 459."

The policy of the law is to *uphold* execution sales and secure the purchaser a good title and to the creditor and bidder the best possible price for property sold, as held in *Knoop* v. *Kelsey,* 12 Mo. 642, 26 S. W. 638. This Court also in the *Kelsey* case, supra, in speaking of inadequacy of price, stated as follows:

> "It may also be said, as well settled, that, while gross inadequacy of the price paid for land at a sheriff's sale may be a badge of fraud, *it is not sufficient alone to avoid the sale.* When such a sale

> is properly attacked, it is the duty of a court of equity to examine carefully all the circumstances, under which it is made, and very slight evidence of fraud, or unfairness, on the part of the officer making the sale, may be sufficient to demand its cancellation. Briant v. Jackson, supra; Phillips v. Stewart, 59 Mo. 942. There are rare and exceptional cases in which the inadequacy is held to be so gross as to amount to a flagrant abuse of judicial process, *and equity has granted relief on that ground alone.* Brown v. Railroad, 43 Mo. 294; Cobb v. Day, 106 Mo. 300, and cases cited; Walters v. Hermann, 99 Mo. 532."

In the instant case the evidence will disclose that there was no unfairness on the part of the Sheriff making the sale; neither was there any repression of bidders nor any attempt to discourage bidders or to keep them away from the sale.

Appellant submits that, under the circumstances herein, the sale made by the Sheriff should not be set aside, particularly for the reason that, if said sales are set aside for mere inadequacy of price, the appellant City would have no recourse in the collection of its benefit judgments. In other words, if the judgment of the lower court is affirmed, all defendants in condemnation proceedings would have an incentive to refrain from paying said benefit judgments, knowing that if they refused and failed to pay that, upon an execution on said judgments, if the bid were small, they would have every reason to believe that the sale would be set aside.

VII.

As heretofore pointed out, under Point I, the respondent or her predecessor in title had *due notice* of the change of grade proceeding by virtue of the commissioners' notice published pursuant to Section 5 of Article XXI of the Charter.

Although the respondent in her petition alleged that she was a citizen of the State of Missouri at the date of the issuance of the execution and at the time of the sale, and that no written notice was served on her of the issuance of said execution or to what county directed, and to what term of court said execution was returnable, as required by Section 1200, R. S. 1929, the judgment and decree is *not* in conformance with the petition in that respect, due to the fact that the said decree finds, adjudges and decrees "that plaintiff's said property was sold without *due process of law* by the Sheriff of said City," which finding is meaningless because of its generality. Nothing will be found in said decree that held the respondent was not served in accordance with Sections 1200 and 1201, R. S. 1929; neither is there any reference to said sections in the decree; however, anticipating that respondent will refer to said sections in her brief, we feel that it would not be amiss to provide this Court with pertinent cases on that particular proposition.

It was shown at the trial of this cause that the Sheriff caused to be published the notice of the execution sale in accordance with the statutes.

The judgment in the instant case was rendered in the Circuit Court of the City of St. Louis *against property in the City of St. Louis,* and the execution was issued *in the City of St. Louis against property situated in the City of St. Louis,* and was sold by the *Sheriff of the City of St. Louis.*

It has been demonstrated by decisions of this Court that section 1200 does not apply in the instant case.

From the decision in the case of *Lohman* v. *Stocke,* 94 Mo. 672, it is apparent that section 1200 does not apply to the case at bar where the *judgment* and *execution* issued in the city (county) where the land is situated. The Court said in that case as follows:

"On the trial defendants objected to the introduc-

tion of any evidence, stating as the ground of objection that it did not set forth a cause of action, in that it did not appear that the notice required by Revised Statutes, section 2381, where real estate is situated in a different county from that in which defendant in the execution owning such real estate resides, was given. The objection was properly overruled if for no other reason than that one of the executions on which the sale was made, issued on a judgment which was *rendered in the county where the land sold was situated.* In Harper v. Hopper, 42 Mo. 124, it is held that the provision of the statute which requires notice to be given to a defendant, where an execution is issued to a county other than that in which he resides, *has been uniformly held to apply only to cases where the execution is sent to be levied on land in a county different from that in which the judgment was rendered and execution issued.* Harris v. Chouteau, 37 Mo. 165; Buchanan v. Atchison, 39 Mo. 503."

The same ruling was made in the case of *Harness* v. *Cravens,* 126 Mo. 233, wherein the Court said as follows:

"But this court has frequently decided that where a party has been personally served with process, or, though resident in a different county, engages in litigation in a county where he has land, and a judgment against him results, that there, having been virtually notified by such judgment, he needs no formal notice that execution will issue, for this he may expect. Harris v. Chouteau, 37 Mo. 165; Hobein v. Murphy, 20 Mo. 447; Buchanan v. Atchison, 39 Mo. 503; Ray v. Stobbs, 28 Mo. 35; Harper v. Hopper, 42 Mo. 124."

In *Harper* v. *Hopper,* 42 Mo. 124, the Court held that section 1200 applies to cases where execution is to be

levied on land situated in a county *different than that in which judgment was rendered and execution issued.*

Further discussing the subject, this Court, in *Young* v. *Schofield*, 132 Mo. 650, 34 S. W. 497, said as follows:

> "Next followed the case of Harris v. Chouteau, 37 Mo. 165, where the parties plaintiff and defendant all resided in Jackson County. Plaintiff sued defendants, had personal service on defendants, and they appeared and defended the action which resulted in judgment against the defendants. After process was served on defendants, one of them removed to Ste. Genevieve county. Subsequent to this, execution was issued in the county of the judgment's rendition, and levied upon land of the removed defendant, and it was afterward sold, etc., but no notification was had upon her, and *it was held she was entitled to none,* Wagner, J., observing: 'If the judgment creditor is so disposed he may issue his execution to a remote county, have the land of his debtor levied on and sold, and possibly buy it in at a great sacrifice, if the owner is not notified so that he can be there and protect his rights. It was to prevent this unconscionable advantage from being taken that the law was enacted. *But where a party is brought into court by personal service, and judgment taken against him, and execution issued to the sheriff of the same county in which the judgment is had, he is certainly fully notified of all the proceedings.*'
>
> "So, too, in Buchanan v. Atchison, 39 Mo. 503, the defendant was sued, personal service had, and judgment obtained against him, and afterward he removed to another county, and his land in the county in which judgment was rendered was sold, it was held for reasons similar to those already given, he was entitled to no notice.

"Likewise, in Harper v. Hopper, 42 Mo. 142, a similar ruling as heretofore mentioned was made where a defendant was resident of a county other than that in which the action was brought, but he appeared to the action and made defense, and this was held tantamount to personal service, Wagner, J., after citing the two cases already noticed in 37 and 39 Mo., saying: 'There is nothing in the present case to distinguish it from those referred to. Although the defendant did not reside in Polk county when the judgment was taken, yet he appeared and defended the suit. The execution was issued to the sheriff of that county, and the land levied on and sold was situated in the same county. He then had sufficient notice that an execution would issue to that county, and he cannot bring himself within the mischief intended to be remedied by law in reference to executions.'

"These cases established beyond question the rule that the strict letter of the statute, section 4943, in so far expanded by construction as to embrace all cases where a defendant being personally served with process in a county where he resides and has land, or personally served, etc., in a county where he has land, or, being sued in a county other than that of his residence, he appears to and defends the action, having land in such county, that, in all such instances *that section as to notice does not apply.* This is the utmost limit to which the letter of the law guided by its reason has been extended by this court in the cases already cited."

In *Buchanan* v. *Atchison,* 39 Mo. 503, the Supreme Court held that a party who changes his residence and removes from the county after the commencement of a suit is *not* entitled to notice under section 1200.

Although some of the cases above cited are cases where personal service was had, it is our contention that the same situation prevails in the case at bar with respect to the character of service.

The application of section 1201 is of no avail in this suit and said section 1201 falls with section 1200.

Conclusion.

Appellant City of St. Louis submits that the action and ruling of the Circuit Court is erroneous in setting aside and holding for naught the Sheriff's sale to appellant Anne M. Evans in view of the fact that the respondent or her predecessors in title received due notice of the change of grade proceedings.

It is also our contention that the sale to appellant Anne M. Evans by the Sheriff was conducted according to the statutes and was not without due process of law.

We also contend that the finding of the trial court that the property involved herein sold for an unconscionably low price is without merit, in view of the fact that said sale was devoid of fraud and conducted fairly and in the usual manner.

In view of the decisions of this Court with respect to the issues in the case at bar, the decree and judgment of the Circuit Court should be reversed.

Respectfully submitted,

E. H. WAYMAN,
JNO. T. HICKS,
FRANCIS J. SULLIVAN,
Attorneys for Appellant,
The City of St. Louis.

Office - Supreme Court, U. S.
FILED
SEP 30 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 385.

THE CITY OF ST. LOUIS, a Municipal Corporation, ANNE M. EVANS, HENRY ERNST and SARAH ERNST,

Petitioners,

against

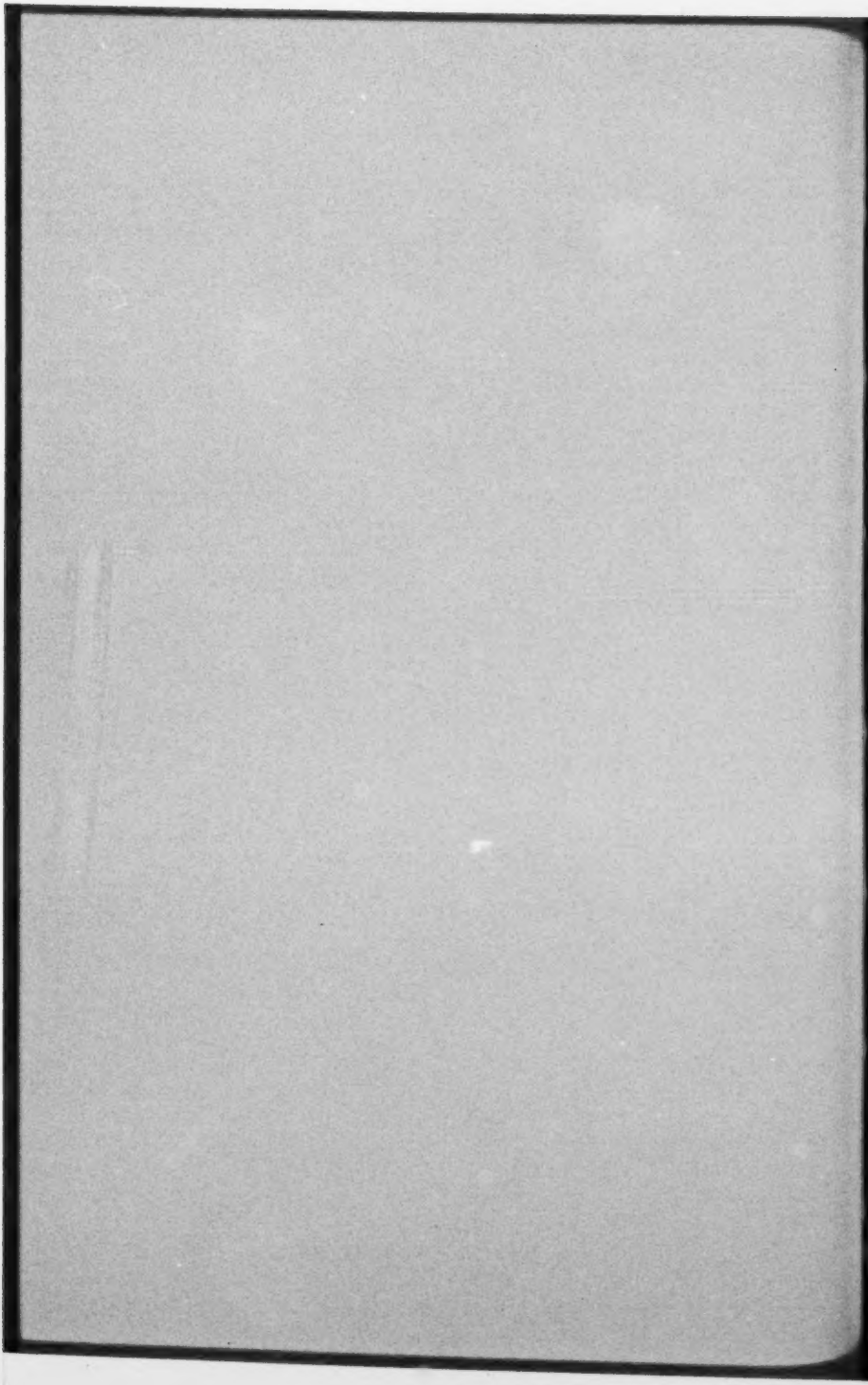
CHARLOTTE CLARK LINDSAY,

Respondent.

REPLY BRIEF OF PETITIONERS EVANS AND ERNSTS.

A. M. EVANS,
Attorney for Petitioners
Evans and Ernsts.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.



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Respondent.

REPLY BRIEF OF PETITIONERS EVANS AND ERNSTS.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Evans and Ernsts, respectfully ask that leave be granted to reply to the Brief of Respondent in Opposition to the Petition for Writ of Certiorari.

REPLY TO RESPONDENT'S ARGUMENT.

I.

It appears that judgments in tax cases in the state courts are treated as res adjudicata in the Federal Court. Therefore the notice as to the tax suit, its judgment, the notice of the foreclosure and the sale, should have been considered by the Supreme Court of Missouri as "res adjudicata." It was said to be "moot," while refusing to pass on the federal question of notice, and refusing to treat the judgment and sale as "Res adjudicata" so that clear title vested in the purchaser at the sale; the Missouri Supreme Court treated the title as still vested in Mrs. Lindsay, and Petitioner Evans as guilty of a fraud on the property of Mrs. Lindsay because of the sale of the property to the Ernsts.

In the case cited by respondent, Honeyman v. Hanan, 300 U. S. 14, 18, see Note 5, Page 25, Chief Justice Hughes says:

> "In the exercise of our appellate jurisdiction we have the power not only to correct errors in the judgment under review, but to make such disposition of the case as justice requires. We have applied this principle to cases coming from state courts where supervening changes had occurred since the entry of the judgment, and where the record failed to state the facts underlying the decision of the Federal Question."

If Government is to continue, it is necessary that City, State and Federal Government have the power to collect tax judgments. All these facts are before this Honorable Court, a valid tax judgment which has been collected by due process of law. In this instance, also, supervening changes have taken place. While this property was in the

possession of petitioner Ernst, all subsequent taxes were paid the City and state. He has recently received notice from the City of St. Louis that suit will be filed because no taxes have been paid on this property the past three years, since, in response to the order of Court, possession to the property was turned over to Respondent's attorney, Mr. Hall, who has collected rents for the past three years, but informed attorney for petitioners that he had not agreed to pay the taxes on the property.

It is pointed out that this Honorable Court is conclusively bound by the facts found by the State Court. The State Court found facts, which upon a proper and just legal interpretation would indicate the tax judgment was duly foreclosed; that title to the property was vested in petitioner Evans at the time she sold said property; that Charlotte Clark Lindsay could have had no title at this time, and that, therefore, she had no standing in a Court of Equity to claim fraud on the part of the purchaser at the tax sale. It was not necessary to include in the transcript evidence which was not admissible in the suit in equity, and whose admission by the Missouri Supreme Court was error. Respondent says on Page 3, line 2:

> "Respondent's petition is not contained in the transcript."

This statement is untrue. **Respondent's petition is included in the transcript** (R. pages 7 to 13), so that the Supreme Court of the United States can review it. Even though all the facts properly pleaded therein be true, if the tax judgment is res adjudicata, the notices therein and in the enforcement thereof constitutional, and in accord with the Fourteenth Amendment of the Constitution of the United States, Mrs. Lindsay's suit in equity should have been dismissed.

II.

In Petitioner's Brief the transcript was closely followed and the question of due notice was strictly adhered to in regard to Mrs. Lindsay's legal rights. But for her attorney to continue to insist that "Every rule of natural justice cries out against this sale and the actions of petitioner Evans" (p. 12, line 13, Respondent's Brief), and that Mrs. Lindsay is entitled to actual notice is unwarranted when at that time she was doing all in her power to avoid receiving any kind of notice, and it is public knowledge that her husband, and her son by a former husband, were wanted by the Federal authorities for the medical diploma mill scandal in Kansas City, and are now serving sentences for fraudulent use of the mail in connection therewith. This property was security for bond given in the Federal Court. It is especially because some citizens seek to avoid actual notice that the law permitting notice by publication becomes justifiable. This law has been held constitutional by the Supreme Court of Missouri in the Schwab case (Petitioners' Brief, page 50).

Reference has also been made to the Miller case (page 6, Respondent's Brief). The property involved therein was property formerly belonging to The International Insurance Company, of which Mr. Emmet O'Malley was receiver as Insurance Commissioner of Missouri. Mr. O'Malley is also serving a term in the Federal Penitentiary. Your petitioner was unable, at the time the Miller case was tried, to secure the necessary data to show that Mr. O'Malley's petition to the Federal Court represented that certain properties were of no value because they had been sold for taxation, without specifying the properties. No report was made of the fact that the Missouri Supreme Court had rendered a judgment which in effect took the property from the purchaser at the tax sale, and allowed

a successor mortgagee, the Missouri State Life Insurance Company, of which Mr. O'Malley became receiver and whose interest had been foreclosed, to secure possession of the property. Your petitioner was too inexperienced to cope with such opponents or to properly present the question of federal jurisdiction to the United States Supreme Court in securing a petition for a writ of certiorari.

Your petitioner Evans has taught Civics and Government in the public High Schools of the City of St. Louis, and as such has an academic interest in this question as well as a legal and personal interest.

The cases cited do not substantiate respondent's contention. The taxes, interest and costs were not paid in the Mangold case, as in the foreclosure of the tax case, in which petitioner Evans acquired the property. In Davis v. McCann, 143 Mo. 172, the Execution Court still was in control of the judgment, and could set the judgment aside. In Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 96, 97, Justice Holmes said:

> "We can only interfere with such legislation and judicial action of the states enforcing it, if the fines imposed are so grossly excessive as to amount to a deprivation of property WITHOUT DUE PROCESS OF LAW" (my emphasis).

The Supreme Court of the State of Missouri undertook to do what the United States Supreme Court would not do.

Respectfully submitted,

A. M. EVANS,
Attorney for Petitioners.

FILED
SEP 21 1940
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 385

THE CITY OF ST. LOUIS, ANNE M. EVANS, HENRY ERNST, SARAH ERNST and J. E. HANGER,
Petitioners,

vs.

CHARLOTTE CLARK LINDSAY,
Respondent.

Brief for Respondent in Opposition to the Petition of Petitioners for a Writ of Certiorari.

Harry E. Hawes
Carl L. Ristine
HAWES & RISTINE,
LEE A. HALL,
Attorneys for Respondent.

4 North Eighth Street, St. Louis, Mo.

GIBSON PRESS, 106 South Ninth Street, St. Louis—CHestnut 0990

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ERRATUM.

By mistake, **J. E. Hanger,** who was a defendant, was included in the title; although he **is not a petitioner herein.**

IN THE

Supreme Court of the United States

No. 385, OCTOBER TERM, 1940

THE CITY OF ST. LOUIS, ANNE M. ERNST, HENRY ERNST, SARAH ERNST and J. E. HANGER,

Petitioners,

vs.

CHARLOTTE CLARK LINDSAY,

Respondent.

STATEMENT.

This is a proceeding by certiorari to review the final judgment of the Supreme Court of Missouri, affirming a decree in equity, with modifications, which decreed the cancellation of a sheriff's deed of real estate to petitioner Anne M. Evans, her deed to petitioners Henry and Sarah Ernst and their deeds of trust to petitioner J. E. Hanger's trustee.

The main facts are these: In the early part of 1925, petitioner, The City of St. Louis, filed a condemnation suit for the construction of Clayton Avenue. The real estate involved was in the benefit district, and then owned by Sarah Ida Jackson.

In June, 1925, respondent and her husband bought that property, took title in Miss Gutch, who conveyed it to respondent and her husband, who conveyed it to respondent's mother, who conveyed it to respondent.

At the time the Lindsays bought the property, they

obtained a certificate of title which did not show the pendency of the condemnation suit.

The commissioners assessed $7.50 benefit taxes against Mrs. Jackson's property (Trans,, p. 39), which ripened into a special judgment in September 21, 1925 (Trans., p. 31).

The City waited nearly ten years and then in August, 1935, had execution returnable to the September Term, 1935, issued to foreclose the $7.50 special lien judgment.

The sheriff advertised the property for sale on September 14, 1935, and sold it to petitioner Anne M. Evans for $85.00. Miss Evans obtained her deed, recorded it, and remained quiet until March, 1936. She conveyed the property to petitioners Henry and Sarah Ernst, for One ($1.00) Dollar, and the unsecured notes of petitioner J. E. Hanger for $3600.00. The Ernsts then executed two deeds of trust to J. E. Hanger's trustee, and Miss Evans traded J. E. Hanger's unsecured notes for the deeds of trust.

On March 7, 1936, Miss Evans, claiming to act as attorney for Henry and Sarah Ernst, demanded the property from respondent's rental agent, and it was surrendered to Miss Evans.

Respondent filed suit in equity, setting up the foregoing facts, that she had no notice of the condemnation suit, the assessment of special benefits against the property, the special lien judgment, that she lived in Kansas City, Missouri, and that six days after the sheriff sold her property, which she valued at $7500.00, she paid three years back general taxes against the property, with penalties. She also alleged that Miss Evans was trying to defraud her out of her property by unfair methods, that the $85.00 was an inadequate consideration and that J. E. Hanger, his trustee and the Ernsts were straw parties for Miss

Evans, who was the real party claiming title to this real estate. It is noted that respondent's petition is not contained in the transcript, but the above facts do appear in the decree of the chancellor, and their brief.

The petitioners appealed to the Supreme Court of Missouri, which affirmed the chancellor's decree cancelling the sheriff's deed, the deed from Evans to the Ernsts and the deeds of trust from the Ernsts to J. E. Hanger's trustee. The chancellor found that the consideration was inadequate, that respondent's property had been sold without any actual knowledge on her part of the special lien judgment or the sheriff's sale, and without due process of law. That the Ernsts, Mr. Hanger and his trustee were straw parties for Miss Evans, that Miss Evans was the only real claimant of the property and had sought by unfair methods to deprive respondent of her property, for an inadequate consideration.

In affirming this decree, the Supreme Court directed the chancellor to modify it by basing his relief on inadequacy of the price paid by Miss Evans, and the actions of the defendants (Trans., p. 53).

The appellants below, petitioners here, filed their motions for modification, for a rehearing and to transfer the case to the Supreme Court in banc, which motions were overruled (Trans., p. 60).

In appellants' motion to transfer the case to the court in banc, petitioners attempted to inject a claim that the opinion or decision of the Supreme Court was a denial to them of the protection of Section 1 of the Fourteenth Amendment to the Constitution of the United States (Trans., p. 59, paragraph 1).

Miss Evans, in her motion for a new trial, did not claim a right under federal law, but did claim that the chancellor erred in holding that respondent's property was sold without due process of law. Thus she is put in the position of complaining in the Supreme Court, because that Court directed the chancellor to eliminate his ruling that respondent's property had been sold without due process of law, which the Supreme Court did by inference when it directed the chancellor to base his relief to respondent on the inadequacy of price and the actions of Miss Evans and her straw parties.

ARGUMENT.

I.

The questions are: (a) was a federal right claimed by petitioners, denied to them, and (b) if so, did the non-federal grounds upon which the Supreme Court of Missouri based its opinion in this case constitute under the facts, a fair or substantial basis for its decision.

> Honeyman v. Hanan, 300 U. S. 14, 18.
> Sec. 344, paragraph b, U. S. Jud. Code.

The chancellor heard and saw the witnesses, found against petitioners, they appealed and the Supreme Court, having the complete evidence before it, affirmed the decree of the chancellor.

This Honorable Court is conclusively bound by the facts found by the State Court, especially as the evidence upon which those findings of fact are based is not included in the transcript.

> Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, 97.

II.

A large part of petitioners' brief is devoted to alleged errors involving purely state questions.

It is the settled rule of the Supreme Court of Missouri that before a citizen of Missouri can be deprived of property by execution under a judgment, the owner must have had actual notice.

That where the owner is actually served with summons, or appears and defends, such owner has had the actual

notice required by law. That non-resident owners may be served by advertisement, for there being no way to serve them within the jurisdiction of the court, the constructive notice binds such non-resident owner from the necessity of the case.

Respondent was a resident of Kansas City, Missouri, being a registered voter there at the time her property was sold, and she testified positively that she did not know of the special lien judgment nor of the sheriff's sale of her property and that she had paid three years back general taxes on her property six days after it had been sold by the sheriff. Petitioner Evans admitted that she was surprised to learn that respondent had paid those back taxes. She tried to make it appear that she did not learn this until after she obtained a certificate of title, but such testimony was very unconvincing.

It is the law of Missouri that the owner whose property has been sold under execution, has all of the return term within which to move the execution division to set the sale aside.

Miss Evans had had experience with that rule. In the case of City of St. Louis v. Miller et al., 82 S. W. (2d) 579, Miss Evans had acquired real estate at a sale for taxes. The owner, learning of the sale before the return term expired, moved the execution division to set the sale aside and the Court sustained the motion which was affirmed on appeal. Miss Evans then applied for a writ of certiorari from this Honorable Court, which it denied.

Evans v. Ins. Co., 56 S. Ct. 123, 168.

In passing, we note the fact that in the Miller case, supra, Miss Evans contended that the owner's remedy, if any, was a suit in equity (loc. cit. 580), while in the

Lindsay case she contends that respondent was guilty of laches because she did not move the execution division within the return term to set the sale aside, although respondent testified that she did not know her property had been sold until after March 7, 1936, nearly six months after the sheriff's sale. There was absolutely no evidence that respondent had any actual notice of the condemnation suit, the special assessment, the special lien judgment or the sheriff's sale.

In the Miller case, supra, the City expressed a willingness that the sale be set aside (loc. cit. 581). In this case the City, although it had its money in full, interest and costs, refused to consent in this case and is here opposing respondent, using every argument it can devise to aid petitioner Evans to keep respondent's property valued at $5,000.00, and sold to satisfy a special lien judgment of $7.50, of which respondent did not know, and therefore had no chance to protect her property, for $85.00.

III.

The only apparent interest that the City of St. Louis has in this case is to have the Court declare that it may sell a citizen's property on published notices under Article XXI of its charter, regardless of whether or not the owner has had any actual notice of its special lien judgment.

> "It is fundamental and essential to due process of law that persons living in this state be given actual notice of suits affecting their property rights and an opportunity to be heard and take steps to protect such rights both before and after judgment."
>
> Black et al. v. Banks (Mo. Sup.), 37 S. W. (2d) 594, 596.

IV.

The state court may ignore the federal right, although properly and timely claimed, if under the facts a fair basis for its decision exists without the federal right.

Broad River Co. v. South Carolina, 281 U. S. 537, 540.

The evidence shows that respondent was the owner of the property in question. That she did not know of the special lien judgment, the execution or sale of her property for about 2% of its value. That before petitioner Evans conveyed the property to the Ernsts, she knew that respondent had paid three years back taxes on the property six days after the sheriff sold it to Miss Evans. That Miss Evans recorded her deed, and then waited nearly six months before she demanded the property for her alleged innocent purchasers for $1.00 and $3600.00 in the unsecured notes of J. E. Hanger, who testified that he did not owe the Ernsts anything at the time he gave them his notes for $3600.00. That he traded his deeds of trust but never had any notes secured thereby, to petitioner Evans when he found that respondent had filed suit to cancel the sheriff's deed, the deed of Evans to the Ernsts and the deeds of trust from the Ernsts to J. E. Hanger's trustee.

This whole transaction sounds like it was shady.

> "When a cause is in chancery, it is in conscience. We think the conservative and better doctrine is that a court of equity in Missouri, acting with caution and only in an aggravated case, and when no aid from other equitable considerations is at hand, may set aside a sheriff's deed on the sole ground of a consideration so grossly inadequate as to shock the conscience."
>
> Mangold v. Bacon, 237 Mo. 496, 521.

We do not feel it necessary to follow counsel in their argument on the binding force of state decisions. We do not agree with counsel as to the binding force of the prior Missouri cases.

Time out of mind courts have overruled, criticized and distinguished their prior decisions, and in contending that previous decisions rule the case at bar or if the Court ignored them altogether, it is a far fetched proposition to say that the Court has deprived a party of a vested right, or has denied them a right under federal law.

V.

Petitioners contend that the Supreme Court of Missouri is inconsistent in its decision, in that it affirmed the chancellor's decree in all things and then remanded the case with directions to modify the decree and base his relief to respondent on inadequacy of the price paid for the property and the actions of Miss Evans and her straw parties.

The substance of the decree was that respondent, having been deprived of her property without actual notice, for an unconscionably low price, and by unfair methods, petitioner Evans and her straw parties had sought to make the deprivation complete, hence the deeds should be cancelled.

And that was the substance of what the Supreme Court affirmed, and in writing up the judgment, the clerk seems to have used the words "be in all things affirmed" (Trans., p. 54).

While the opinion in the concluding paragraph (Trans., p. 53), only says

> "the judgment is affirmed and the cause is remanded with directions to modify the decree nisi and base the relief granted respondent upon the issue of inadequacy of price and the actions of defendants Evans, Hanger, and the Ernsts as herein discussed."

The alleged inconsistency is merely a misprision of the clerk, at best a formal error only remotely, if at all, affecting the case. It is strictly a state question in no way affecting petitioners' rights under the Constitution or laws of the United States.

Section 1099, R. S. Mo. 1929, provides that a judgment shall not be affected by "any other default or negligence of any clerk * * * by which neither party shall have been prejudiced."

This Honorable Court in certiorari proceedings does not sit as a court of general review.

> Waters-Pierce Oil Co. v. State of Texas, supra, 212 U. S. 86, 97.

VI.

The respondent claimed in her petition that her property had been sold without due process of law in that she never had any actual knowledge of the condemnation suit, the assessment of special benefits and judgment against the property or of the sheriff's sale thereof.

The petitioners specifically denied that the sale was conducted without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

While the chancellor did decree that respondent's property had been sold without due process of law in violation of the Federal Constitution, the Supreme Court of Missouri on appeal directed the chancellor to base his relief on inadequacy of price and the actions of petitioners Evans, the Ernsts and the Hangers. The effect of this decision of the State Supreme Court was to eliminate the federal question raised by the respondent.

VII.

As to the Supreme Court's holding that respondent did not have actual knowledge of the proceedings for the improvement of Clayton Avenue, the judgment or of the execution sale before respondent's rental agent was notified (March 7, 1936), the petitioner City contended in its motion to modify (Trans., p. 55) that unless the published notice was sufficient, then the decision was liable to be misconstrued to require actual knowledge in addition to published notice as provided by Article XXI of the City's Charter; and unless so modified, the opinion would have a very serious effect on future bids at execution sales under special benefit judgments.

That contention of the City only appealed to the Supreme Court of Missouri to construe the law of Missouri in a way to aid the City in future sales of property under special assessment lien judgments. If there is any merit in the contention, it was purely a state question, and did not involve any federal right.

VIII.

It is also the rule in Missouri that the sheriff in selling property under an execution is the agent of both parties, and it is his duty to see that the property is not sacrificed. If he cannot obtain a fair price for it, he should adjourn the sale for the want of bidders.

Davis v. McCann, 143 Mo. 172, 178.

In this case the sheriff sacrificed respondent's property. The City got its part of three years back taxes which respondent paid six days after the sheriff's sale (which is mighty persuasive evidence that respondent did not know of the special lien judgment or that her property had been sold).

Every rule of natural justice cries out against this sale and the actions of petitioner Evans and her straw parties.

The questions involved were rules of real property, and execution sales under state law.

We respectfully submit that the writ of certiorari should be denied.

HAWES & RISTINE,
LEE A. HALL,
Attorneys for Respondent.